SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 233

JAMES J. WALDRON, PETITIONER,

vs.

MOORE-McCORMACK LINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., OCTOBER 24, 1966

[fol. A]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 29504

JAMES J. WALDRON, Plaintiff-Appellant,

against

MOORE-McCORMACK LINES, INC., Defendant-Appellee.

Appellant's Appendix

[fol. 1]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JAMES J. WALDRON, Plaintiff-Appellant,

against

MOORE-McCORMACK LINES, INC., Defendant-Appellee.

STATEMENT UNDER RULE 15(b)

Suit was commenced by filing of Summons and Complaint on May 13, 1960. Issue was joined by service of Answer on December 27, 1960.

Trial with a jury, before Hon. Charles H. Tenney, U.S.D.J., was held on March 30, 31, April 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15 and 16, 1964.

Plaintiff's claim for unseaworthiness based on the alleged failure to provide sufficient manpower was dismissed by the Court on April 16, 1964.

Verdict on the jury issues was rendered for the defendant on April 16, 1964.

Final judgment for the defendant was filed on April 17, 1964.

Plaintiff's motion for a new trial was served on April 27, 1960, returnable May 15, 1964.

Plaintiff's motion for a new trial was denied, pursuant to Opinion No. 30561 and Order of Tenney, J. filed on November 10, 1964.

Plaintiff's notice of appeal from the judgment and denial of plaintiff's motion for a new trial was filed on November 20, 1964.

[fol. 2]

Excerpts From Testimony

JAMES J. WALDRON, the plaintiff, being first duly sworn, testified as follows:

* * * * * * *

Direct examination.

By Mr. Friedman:

* * * * * * *

Q. When the vessel arrived in New York did you participate in any way in the docking operation?

A. I participated in my usual docking assignment.

Q. Do you recall which pier was employed on May 8, 1960?

A. I don't know the exact name but it was a new pier that Moore-McCormack Lines had just constructed.

Q. And where was this? Was this in the North River, the East River, or Brooklyn?

A. In Brooklyn.

* * * * * * *

Mr. Kimball: I read from the deck log book, May 8, 1960. I am just reading one line at this moment.

(Reading) At 12:40, that being the hour, 12:40, called deck crew for docking.

By Mr. Friedman:

Q. Now, Mr. Waldron, can you explain to me just what calling the deck crew for docking involves?

A. They call approximately fifteen minutes before they actually intend us to report to our job.

Q. And after getting the call did you report to your job station?

A. I got ready to go to work and went to my docking station.

Q. Now when you got to your docking station, who was in charge, if anybody, of the work that you were to do at that time and place?

A. The man in charge is the mate that is in charge of the after section of the ship.

[fol. 3] Q. Is that the third mate?

A. That is the third mate, Mr. Tarantino.

Q. Now with regard to what occurred on May 8, 1960, do you recall what was the first thing that you did with regard to the docking operation?

A. The first thing I did: I went out of the house section and stepped on to the deck. It appeared to be very slippery.

I continued back aft on the stern of the ship where the lines are stored and I was standing on gratings there so it wasn't too bad.

* * * * * * *

Q. Now, Mr. Waldron, you told us that the first thing you did with regard to the docking operation in the early afternoon of May 8, 1960, at Brooklyn, was that you went to the stern of the vessel, the very end, the rear, is that correct?

A. That's correct.

Q. Now, I think you told us that there was grating there.

A. There were gratings.

Q. Would you tell us what you did first? I want to go quite slowly now, if you please.

What was the first thing that you did with regard to this docking operation?

A. This was Sunday, going into New York?

Q. That's right, the afternoon of May 8, 1960, sometime shortly after 12:40, when you got to the docking spot.

A. I reported back there and there wasn't the usual number that is generally there. I noticed that. There was only a few of us. The mate came there and he told us to start passing out the lines.

I assisted in a couple of lines going through the aft chock, another one, and the third line was worked on. I say "worked on," but he indicated to put out—he indicated a forward chock—

Q. First, before we come to that, Mr. Waldron, did you pass out some lines through some chock or more than one chock at the aft end of the vessel?

A. I did.

[fol. 4] Q. And did anything unusual occur at that time?

A. Nothing unusual.

* * * * * * *

Q. By the way, do you recall which side of the vessel you were working on at this time in terms of the pier? Were you inboard, closer to the pier, or outboard, or what?

A. I was inboard.

Q. And do you recall whether that was the starboard side or the port side?

A. Starboard, which is the right.

Q. The right, facing to the front of the vessel?

A. Yes.

Mr. Friedman: May we have the grease pencil to mark 2-A?

Q. Would you be so kind as to mark, with just a small No. 1, the chock that you were using first.

A. I couldn't say which one I used first. I put out two lines but their order I don't know.

Q. While you were working on those two lines, what were you standing on?

A. On the wooden grating.

Q. And then would you just mark both with a No. 1?

A. Two 1's, if you would be so kind.

Q. Did you have any assistance? Was anybody working with you when you put the lines out from these chocks that were farthest to the stern, to the end of the vessel?

Mr. Kimball: Objection, if your Honor please.

The Court: Overruled.

A. Yes. I had one man assisting me.

Q. Where was the rope that you were using? Where was it placed before, immediately before you started to use it in terms of these aft chocks?

A. It was flaked on top of the grating.

Q. How far from these two chocks that you have marked with an orange No. 1, how far was the rope that you used [fol. 5] for those particular chocks?

A. It's not very far. I can't say exactly. I can estimate.

Q. Just approximately.

A. Ten feet.

Q. Was the rope on the gratings or not?

A. The rope was on the gratings.

Q. Now, after you completed the putting out of the line through those two chocks, did you receive any instruction to do any further work?

A. I was told to take another line forward.

Q. For what purpose?

A. To pass it out through a forward chock.

Q. And were you advised as to which chock to use for that purpose?

A. A chock located—

Q. Were you told?

A. I was told which chock, yes.

Q. Who was it that instructed you to use that particular chock?

A. The mate that was back there.

Q. That is the third mate?

A. Mr. Tarantino.

Q. The third mate?

A. That's right.

Q. Could you mark that with a No. 2, the chock that you were instructed to use at that time?

A. (Witness marks.)

Q. You have marked—

A. I made an X on it.

Q. Put a No. 2 there, if you would be so kind, above it.

A. (Witness marks.)

Mr. Friedman: Suppose I at this time hold that up for the jury to see.

I assume that it is here that this substituted exhibit is obviously only the rear half of the vessel.

Q. Will you tell us now, Mr. Waldron, where was the rope that you were to use for the purpose of putting it out through this chock that you have indicated with the No. 2? Where was that located?

A. It was coiled on the grating.

Q. I will tell you what: Would you just indicate, if you can, very approximately, with an R, where approximately [fol. 6] this rope was that you were to use for that chock No. 2? Just give an approximation with the letter R, if you would please be so kind?

A. The letter R?

Q. Yes, just write the letter R in and the approximate area where the rope was coiled.

A. (Witness marks.) No, I am mistaken there.

(Witness marks.)

* * * * * * *

Mr. Kimball: No, your Honor, I don't know whether it was or was not recorded but, as your Honor may see from the exhibit, Mr. Waldron crossed out the first R and put a second R. I just wanted the record to indicate that. Otherwise there is a totally unexplained marking of the exhibit.

The Court: All right, let's put a circle around the correct R.

Mr. Friedman: Okay.

(Witness marks.)

A. If I had the ship here I could do it easily.

(Mr. Friedman shows exhibit to jury.)

Q. Now, Mr. Waldron, will you tell us just what you did after you received this instruction from the third mate to put the rope out through this forward chock?

By "forward" I mean forward of the others, still an aft chock, actually.

A. The man that was assisting me picked up the eye of the line and I followed behind him perhaps—I don't know, ten, fifteen feet, with a portion of the line in my hand, and we started tugging this line.

Q. Can you tell me what kind of line this was?

A. It's eight inches in circumference.

Q. Can you hold up your fingers, please, so that the jury can see you indicating?

A. No, I couldn't—

Q. The circumference is eight inches?

A. The circumference is approximately eight inches. It's very big, heavy.

[fol. 7] Q. Would you go ahead? Just what happened?

A. We had to drag this line, haul it to the chock.

Q. Now the area from where the rope was located to where the chock was, can you tell me what that area consisted of—this chock No. 2?

A. A slippery deck.

Q. Well, was that area covered with gratings?

A. No, that area was not covered with gratings.

Q. Was this chock—No. 2—was that one that you had used previously on previous docking operations?

Mr. Kimball: Objection, if your Honor pleases.

The Court: No, I will permit it.

A. I had never used that chock before.

Q. Now will you go ahead and tell me—you told me that the other man picked up the eye of the rope. Is that what you said?

A. Yes.

Q. That was the very front portion of it?

A. That is the part that is—it's a circle and it's put on a bitt on the dock.

Q. And he grabbed a-hold of that?

A. He had the eye.

Q. And he—

A. Started forward.

Q. Towards the chock?

A. Towards the chock.

Q. And after he went a certain distance, what did you do?

A. After he went a certain distance I followed behind him so as to help him pull this line so he wouldn't be pulling the whole thing.

Q. Go ahead.

A. Well, in pulling the line I got the eye as far as the bitt, I returned to the pile of line, grabbed another piece of it, and started dragging it so he would have sufficient line to pass out the chock to reach the dock.

During this docking one man has to pass the line out and hold it. I mean, he generally holds it with his foot. The line is going out through a chock and he will put a bend in it, by holding it down, applying weight, it is flexible [fol. 8] and it bends easy, and he lets up a little bit and it will run out.

He was holding that line and I was carrying in more line. I had enough there.

Q. And what was the purpose of your carrying more line towards him? Was that a regular procedure or was it not a regular procedure?

A. Well, generally a couple of us would do that but we were shorthanded. I had to bring the slack to him.

Mr. Kimball: I object.

The Court: Strike that answer as not responsive.
Could you repeat the question?

Q. Mr. Waldron, would you listen to the question, please? What was the purpose of your carrying more line towards the man that was up front?

A. Well, if he started letting it out and it ran out, it would jerk everything: it wouldn't go down. It would be stuck. You would have to let it out just so far.

Q. Is it part of the regular procedure of this operation you were performing for you or for someone to provide more line and carry additional line towards the man who was up front of the chock?

A. Yes.

• • • • • • •

Q. When you speak of the procedure of providing additional line for the man at the chock, is this standard procedure for all chocks or is this just with regard to this particular chock, or what?

A. The other chocks—we do the same thing. We don't have as far a distance.

Q. I am not talking about the distance. All I want to know is this: The man who is at the chock and controlling the handing out of the line—

A. Oh, yes, there is always somebody there.

[fol. 9] Q. Whichever chock is in use?

A. Yes.

Q. Do the other men provide him with additional lines?

A. Yes.

• • • • • • •

Q. Mr. Waldron, on May 8, 1960, as you were dealing with chock No. 2, would you go ahead and tell us exactly what you did, carrying on from what you have already told us? What is the next thing you actually did?

A. Chock No. 2—

Q. What we call here chock No. 2 on this exhibit. Now go on.

A. The last chock I worked on?

Q. Yes. What was the next thing that you did? Would you please go ahead and tell the jury what happened?

A. I returned to this pile of rope and I started tugging on it, pulling. It was heavy, like I said. I was pulling as hard as I could.

Q. And did you make any movement?

A. Make any movement in what way?

Q. Did you just stand at the place where the rope was or did you start to move in any direction, or what?

A. I was moving backwards from the pile.

Q. And did you move a certain number of feet or yards or inches or what?

A. Yes. I would say perhaps ten feet.

Q. And at this time just what were you doing? Did you have your hands on anything?

A. I had my arm around one, this one (indicating).

Q. Around the rope?

A. Yes.

Q. And what were you doing with regard to the rope?

A. I was jerking on it, pulling on it.

Q. Were you leaning in any direction or just standing upright or what?

A. Just trying to pull it backwards.

Q. And at that time what were your feet on? Were they on the grating or on the knot, or what?

A. They were on the deck.

[fol. 10] Q. And what if anything happened?

A. My feet went out from under me.

Q. And what happened to you?

A. I struck the deck.

Q. With what part of your body?

A. The back part of my body. I hit it very hard.

Q. What was this deck made of?

A. Steel.

Q. And can you describe to me your fall? Did you just sort of crumple a little or what? Just what happened?

A. I was pulling, like I said, on an angle like that—you know, trying to walk with the line and pull it at the same time, and my feet went out and I went down.

Q. And what was the first part of your body that struck the deck?

A. Well, I couldn't say the first part. I hit the deck with my back, and hit hard. That's all I know.

Q. What did you feel at that time, if anything?

A. Just a little sore, maybe.

Q. And where was this soreness?

A. On my back, around my beltline.

Q. Did you remain on the deck or what did you do next?

A. The person I was working with—I don't know what he said; he said something. I don't know. I got up and continued with the line for a few more minutes.

• • • • • • •

Q. Mr. Waldron, do you recall or do you have any idea as to how long you remained on your back on the deck after your fall?

A. I couldn't say exactly.

• • • • • • •

Cross examination.

By Mr. Kimball (continued):

Q. Now, Mr. Waldron, I think the substance of your testimony, as I understood it, was that you were injured on May 8, 1960, while docking or assisting in the docking of the vessel at the 23rd Street pier, Brooklyn, is that correct?

A. Yes, sir.

[fol. 11] Q. And you say that you had already assisted in passing out two lines and you were helping to pass out a third line when the accident occurred, is that correct?

A. Yes, sir.

Q. Now this third line was the last line which you assisted in passing out to the dock and the vessel was com-

pletely secured within approximately five minutes after the occurrence of your accident, is that correct?

A. Yes, sir.

Q. Now since the log book shows that on May 8, 1960, the vessel was finished with engines, vessel fast and starboard side to east side outer berth at 23rd Street Terminal at 1331, if your estimate is correct, that would indicate that your accident occurred approximately five minutes before 1331, is that so?

A. Around that time, yes, sir.

Q. Now 1331 is another way of saying 1.31 p. m., is it not?

A. Yes, sir.

Q. So your accident occurred approximately 1.25 p. m. on May 8, 1960, is that correct?

A. The best I can remember.

Q. Now there were other men on the stern of the vessel who were working with lines on the offshore side at the time the accident occurred, is that correct?

A. Yes, sir.

Q. The log says here, under the same date, May 8, 1960, 1320—that would be 1.20 p. m.?

A. (No response.)

Q. Is that right?

A. Yes, sir.

Q. It says "1320. First line ashore."

I suppose that that first line was put ashore by some members of the forward docking gang, is that correct?

A. It's possible, sir.

Q. Well, that would be the normal procedure, would it not?

A. Yes, sir.

Q. And if the normal procedure was followed and the first line that went ashore was put out by the forward docking gang at 1320, then the aft docking gang put its first line out sometime after 1320, right?

A. Yes, sir.

Q. And since, as you have told us, the aft docking gang on that occasion put out a total of five lines, that would

[fol. 12] mean that between some time after 1320, when the forward gang put the first line out, until 1331, when the vessel was finished with engines and fast starboard side to the east side outer berth at 23rd Street Terminal, the aft gang put out a total of five lines; is that correct?

A. (No response.)

Q. Sometime during that period.

A. Well, roughly that time, yes.

Q. Well, that would indicate, would it not, that in ten minutes you got out five lines?

A. I wouldn't say ten minutes, no, sir.

Q. But that, of course, is what the log shows, does it not? 1320 to 1331?

A. Yes, sir.

Q. Eleven minutes?

A. Yes, sir.

Q. And the first line that went out was at 1320 and that was the forward station?

A. Yes, sir.

Q. You told us yesterday afternoon that moisture or water on a steel deck of a vessel will cause the vessel deck to be slippery to some extent; do you remember saying that yesterday?

A. Yes, sir.

Q. Now the log book under this same date, May 8, 1960, states as follows:

"1016"—that would be sixteen minutes after ten in the morning, is that correct?

A. (No response.)

Q. 1016?

A. Yes, sir.

Q. (Reading.)

"Stand by engines. Master at conn. Fog sets in. Lookout posted. Whistle sounded. Radar in operation. All fog rules obeyed."

Then at 1110, which would be ten minutes after eleven in the morning; is that correct?

A. Yes, sir.

Q. It says vessel proceeds cautiously in dense fog.

Then at 1200—that is 1200, which would be twelve noon, is that correct?

A. Yes, sir.

Q. It says: Weather cloudy and light fog.

Now there are no entries in here about weather while the vessel is docking.

[fol. 13] The next entry which makes any mention about the condition of the weather is at 1600, which would be four p. m., right?

A. Four p. m., yes, sir.

Q. It says: Overcast with light rain.

Now at the time this accident occurred to you the steel deck on the starboard side aft end of the vessel, the deck upon which you were working in part was damp, moist or wet at the time, was it not?

Mr. Friedman: Your Honor, I would like to take them, if I may, one by one, since they have different connotations.

Mr. Kimball: That is agreeable with me. I will withdraw the question.

Q. The decks were moist, were they not?

A. I cannot say. I am not sure of that.

Q. The decks had water on them, did they not?

A. Not that I recall.

Q. The decks were wet, were they not?

A. With paint.

Q. With water, I am talking about.

A. No, not that I recall.

Q. Do you recall these various questions and answers—

Mr. Kimball: Unless counsel will stipulate from page 37.

"Q. It was two o'clock in the afternoon when you actually slipped and fell, is that correct?

"A. Yes. I think it was still misty here in the harbor.

"Q. It was not a clear day, then?

"A. No, it was not."

To which you have added: "I don't think it was."

"Q. I thought before that you testified that it was.

"A. I am—I mean, the vision was clear, but it was damp.

"Q. Was the deck wet?

"A. It appeared to be wet; yes. Then after leaving Boston, taking those lines in, they dipped in to the water as [fol. 14] you were taking them in, all that water lies over the deck."

Page 38:

"Q. I am trying to find"—

Page 38:

"Q. I am trying to find out when you started this docking operation in New York, you say the deck was apparently wet, is that what you said?

"A. It appeared to be."

A question from page 40:

"Q. You say that you observed water on the deck, or is it that you do not remember whether you observed water on the deck of the vessel when the vessel came into New York on May 8, 1960?

"A. I know it was very slippery.

"Q. The question is, did you observe water on the deck either around the coils of line or in the area of the deck where you were working?

"A. There was no puddles of water. It's a flat deck.

"Q. But you say it appeared to be wet. I believe you said that before.

"A. It appeared to be wet, yes."

I will continue:

"Q. When you say it appeared to be wet, what do you mean by that?

"A. Well, it was extra glossy.

"Q. Could you see either beads of moisture on the deck?

And then he was interrupted.

"A. Moisture. That is what I am referring to when I say wet. I am referring to moisture. I don't know if you understood me when I said that before. It was moisture.

"Q. Sort of beaded with water all over the deck, is that right?

"A. Yes. It could have been oil in the paint. It could have been water. It could have been anything.

"Q. When you fell down on the deck you were pretty close to it at that point, were you not?

"A. Yes.

[fol. 15] "Q. Did you observe at that point whether the beads of whatever"—and again he was interrupted.

A. My hands were all wet. My pants were wet. The line itself was wet.

"Q. It was wet rather than covered with oil, is that correct? Your hands"—and again he was interrupted.

A. From water.

"Q. Your hands and trousers?

"A. From water, I'd say."

WALTER J. CHOWANIEC, called as a witness by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Friedman:

Q. Mr. Chowaniec, are you a seaman?

A. Yes, sir, I am.

Q. And for how long have you been employed as a seaman?

A. I have held seaman's papers from 1943, and I have been shipping quite regularly, I would say, for the past 12 years.

Q. And in what department have you principally sailed?

A. I have sailed in the deck department, principally.

Q. Now, in what particular capacity over the last few years—I don't want to go all the way back to '43 or '4, but in the last three or four years?

A. As deck maintenance and as boatswain.

* * * * * * *

Q. Do you recall when you were employed aboard the SS Mormacwind?

A. Yes, sir, I do.

Q. Could you tell me the dates, if you recall those, or if you have some certificates of discharge which would help you, refer to those?

A. I was first employed aboard the Mormacwind in '49, and I had steady employment there until, I believe, July, the first week in July of 1961.

[fol. 16] Q. Did you say 1955?

A. '59. I was employed aboard the Mormacwind until about July—the first week in July of '61.

* * * * * * *

Q. Now, Mr. Chowaniec, going back to your employment aboard the SS Mormacwind from '59 through 1961, during the voyage from February 9, 1960, through May 10th of 1960, you were employed aboard that vessel; correct?

A. I was.

Q. And during that particular voyage, what was your capacity?

A. As able seaman.

Q. Do you recall, if you do, what particular watch you worked?

A. I was on the 4-to-8 watch, also on the 12-to-4 watch.

Q. And with regard to your docking station, that is to say, your regular docking station, which area were you regularly or customarily assigned to?

A. If I was aboard on this particular trip on the 4-to-8 watch, my docking station would be on the bow or forward.

Q. On May 8th of 1960 there was a dock call, according to the records, at 12:40 as the vessel was coming into a Brooklyn pier. Do you recall to which section of the vessel you first reported as a result of that docking call?

A. I reported to the bow section.

Q. What, if anything, happened after you reported to the bow section with regard to yourself?

A. Our telephone rang. The third officer on the after station requested aid of one of our men from the forward section to come aft.

Q. And who was in charge at the bow station where you were?

A. The second officer, McKeller.

Q. What order, if any, did he give to you at that time?

A. He says, "Walter, you are elected."

Q. And what did you do next?

A. I grumbled, I didn't like it, but I went back there.

Q. Now, do you recall whether there was a member of the crew on that SS Mormacwind by the name of Mr. [fol. 17] Whitaker?

A. Yes. He was one of the ordinaries. I don't recall on which watch it was though.

Q. Do you know or recall which station he was regularly assigned to with regard to the bow or the after end as to the docking operation?

A. He was on the after section; that's all.

Q. When you got back to the after station on May 8, 1960, was Mr. Whitaker there?

A. No, Mr. Whitaker was not.

Q. Do you happen to know where Mr. Whitaker was at that time?

A. He was hospitalized at that time.

Q. He was in the ship's hospital?

A. Yes.

Q. Now, do you recall a member of the crew by the name of Jackson?

A. He was an AB, I believe, at one time on the 8-to-12 watch, and then on the 12-to-4 watch.

Q. And at the time on May 8, 1960, what was his regular station, forward, on the bow, or aft, in the rear?

A. He was aft.

Q. And when you got back there on May 8, 1960, was Mr. Jackson there?

A. Mr. Jackson was not there.

Mr. Friedman: May I, with the Court's permission, just read to the jury from the exhibit, Defendant's Exhibit A, the deck log for May 8, 1960, from noon to 2, "Helmsman, Jackson."

By Mr. Friedman:

Q. Would that indicate that Mr. Jackson was on the bridge handling the wheel during that time period?

A. Yes, sir, that would.

Q. And of course noon to 2 would be 1200 to 1400; correct?

A. That is from 12 to 2.

Q. Do you recall what you first did when you got to the after station?

A. Our first order there was to get the springwire—springwire ready for putting ashore.

[fol. 18] Q. And what did you do?

A. I made the heaving line fast to the eye of the wire, I proceeded out to slip it out through the chock to the lineman on the dock.

Q. Now, you are now talking about the first chock operation that you performed; correct?

A. That is correct.

Q. Now, I show you Plaintiff's Exhibit 2A and I ask you whether you find on the particular chock that you used for this first operation, letting out of what you referred to as the springwire?

A. Yes, sir, I do.

Q. Now, at the present time does it have any indication or number or letter or anything adjacent to it?

A. Yes. It has a 1 orange mark.

Q. There are two such chocks indicated with an orange 1; correct?

A. That is true.

Q. Now, one is farther aft than the other; correct?

A. Yes, sir.

Q. Now, of those two 1s, which is the chock you are referring to at the present time, the one that is farther aft or the one that is forward of it?

A. Forward of it.

Q. Of the two 1s then the one more forward?

A. Yes.

Q. Now, in the course of that operation, did you work alone or did anybody work along with you?

A. I was assisted by another AB.

Q. Do you recall who that was?

A. It was Mr.—I do not recall his name.

Q. Are you looking at him?

A. I am looking at the gentleman there.

Q. Is it Mr. Waldron?

A. Waldron is the name.

Q. Now, what was the next thing you did?

A. The next order was, after the wire is fast, "You take this new manila line that is coiled, start carrying it on the foredeck. We are going to put out one more line."

• • • • • • •

[fol. 19] Q. Mr. Chowaniec, you received an instruction to use one of the lines forward, you so told us a moment ago; correct?

A. Yes, sir.

• • • • • • •

Q. Now, precisely, if you recall, or in substance as best you can recall, what did Mr. Tarantino tell you to do at that time?

A. He says, "Walt, we have one line that we must take as far forward as possible." He said, "I want you to get that line and take it down to the deck and bring it over to the edge of No. 4 hatch, put it out through that chock, and get it out as quickly as possible."

Q. Now, the particular chock that he instructed you to use, is that indicated on Plaintiff's Exhibit 2A now before you?

A. Yes, X-2.

Q. Does it have any number next to it?

A. 2.

Q. After you received this instruction from Mr. Tarantino, what was the very next thing you did?

A. I told him I would need help, so he directed Mr. Waldron to assist.

So I pulled the splice, the 10-foot eye splice, and the large foot of about 15-foot of slack threw it over one shoulder and over the other, and I had Mr. Waldron take off a few turns to give me slack and momentum so I could proceed down the deck rapidly, or as fast as I could, to the area marked here 2X.

Q. Go ahead. Just tell us what you did.

A. And after I felt that we had sufficient amount of slack, I said, "Here goes." Mr. Waldron was about 10 feet behind me pulling off the slack of a coiled line which was about four foot of height.

I proceeded down the deck, bulling my way, as I was the biggest man on the after section, and I could possibly be the strongest. I continued on, when I noticed that there was a bit of strain coming on this line. So I tried leaning into the weight of it, leaning forward, and to pull more slack, and I got as far as the bitts, and that was where I was pulled back from lack of slack.

[fol. 20] Mr. Waldron's job there was to give me more slack. Evidently he—

Q. Just tell me what you actually observed, Mr. Chowaniec. What then did you observe next, if anything?

A. When I was yanked back from lack of slack, I glanced sidewards, as the deck was tacky and I didn't want to lose my good footing—I glanced sidewards, about, I would say, a 45-degree look, and Mr. Waldron was in the process at one time of pulling this slack off this line, and he was about 15 feet from the coil, and this line was coming down sort of in a loop; and I went forward a bit further, I would say possibly 10 feet, when again I was brought up short; not enough slack.

Q. At that point what was your location with regard to the chock indicated by the number 2?

A. I would say I was just about even with the position marked 2.

Q. Go ahead.

A. And I glanced back, and Mr. Waldron was lying on the deck on his back alongside of the line.

I became rather angry, as I know this job requires speed and much slack, so I dropped my eye at the position marked 2, raced past Mr. Waldron and the line, and got to about 10 feet from where this coil is, and I grabbed more slack and proceeded back on the deck.

Then I went to my position marked 2, where the eye was, put it through the chock, made a heaving line fast, hollered to Mr. Waldron, "Feed the slack steadily to me. I'll need at least 150 feet."

And at that time he started to give slack while I was feeding it out through the chock to the lineman on the dock.

Q. Mr. Chowaniec, at the time that you saw Mr. Waldron on his back on the deck, can you tell me where on the deck that was? Is there any indication at the present time on Plaintiff's Exhibit 2A, just approximately, if you can?

A. I would say it was about half way between positions marked 1 and 2.

[fol. 21] Q. Now, in that section of the deck from where there is a circle with the R in it to the chock marked No. 2, can you tell me whether that area of the deck at that time, on May 8th of 1960, had any gratings on it?

A. No, sir. There were no gratings on the main deck at that time.

Q. By the way, this line that you were using, where was it coiled. Is there any indication on the exhibit, Plaintiff's Exhibit 2A?

A. Right alongside of the position marked 1, circled here in orange, marked R.

Q. That is where the line was piled?

A. That is where the line was coiled.

Q. When you raced back from chock 2, did you go all the way to that orange-circled R position?

A. No, sir.

Q. What?

A. No, sir.

Q. Would you tell us then where you did go?

A. I stopped about 10 to 15 feet from that coil and proceeded to grab with one hand and throw it in the air and

pull it with the other hand to get the amount of slack that I thought I would need.

Q. At that point where was Mr. Waldron, if you recall?

A. He was somewhere beyond me. I would say 10 or 15 feet behind me.

Q. You were heading in an aft direction, weren't you?

A. Yes.

Q. When you went from chock No. 2 to this position, 10 feet from the circled R, did you pass Mr. Waldron on the way?

A. Yes, sir, I did.

Q. And what was his position at that time as you came by him, if you observed?

A. He was in the process—he was on the side, coming up with one hand in the other and the other hand picking himself off the deck.

[fol. 22] DEWEY DARRIGAN, called as a witness by the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Friedman:

Q. Captain Darrigan, for how long have you been employed and active in the maritime industry?

Mr. Kimball: If your Honor please, I wasn't aware he was in the maritime industry.

A. At least forty years.

The Court: Ask him what his employment is, his past employment, and so on.

Mr. Friedman: That is what I am trying to do, your Honor.

Q. And during those past forty years can you tell me what you started as?

A. I started as a seaman in 1914.

Q. And in what capacity as a seaman?

A. As a seaman.

Q. What would be called now an ordinary seaman?

A. An ordinary seaman, yes.

Q. And did you sometime thereafter become a licensed officer?

A. Yes, sir.

Q. And when did you become a licensed officer?

A. In 1924.

Q. And what was your first license, in what capacity?

A. As a third officer.

Q. Third mate?

A. Yes, sir.

Q. And was this obtained by virtue of going to any merchant marine academy or did you, as they say, work your way up from the forecastle?

A. I worked my way up, sir.

Q. Now, thereafter did you have other posts and positions in the maritime industry?

A. Yes, sir.

[fol. 23] Q. And at the present time what licenses or certificates do you hold? What rating?

A. I have a master's unlimited license, fifth issue.

Q. Master's unlimited what?

A. License of the fifth issue.

Q. Just what does that mean?

A. That means I am at it twenty years, twenty-five years.

Q. And does that mean that you can be a captain of any vessel? Is that the unlimited part of it?

A. Yes, sir.

Q. Including on the high seas or just in port or what?

A. On the high seas, sir.

Q. And for how many years did you actually serve as a master, a captain aboard American Flag vessels?

A. Ten years, sir.

Q. What branch of the Service were you in during the war?

A. I was in the navy, sir.

Q. What type of work did you do in the navy?

A. I was a cargo-operations officers in the South Pacific.

Q. And what grade did you hold?

A. Lieutenant senior grade.

Q. What has been your most recent employment?

A. I work for the United States Government, Department of Commerce, for the last five or six years.

Q. And in what particular department thereof or section?

A. My title was ship-operation assistant.

Q. And was there a branch of the Department of Commerce that you worked for?

A. Yes, sir. They called it the Maritime Administration.

Q. And what did your duties for the Maritime Administration call upon you to do?

A. They consisted of the surveying of all government-owned or subsidized vessels.

Q. What does that mean?

A. Well, I made physical surveys of vessels to see that they were maintained in their proper condition and I surveyed them on dry dock and a physical survey, as we call it, a physical inspection.

[fol. 24] Q. You would actually go down to the vessels yourself personally?

A. Yes, sir.

Q. Are you familiar with C-3 vessels, those types of vessels?

A. Yes, sir.

Q. Do you recall—if you do—whether you ever had occasion to be on the S.S. Mormacwind?

A. It's possible, sir.

Q. In what capacity?

A. As a surveyor.

Q. And do you have any recollection as to the time period involved?

Mr. Kimball: If your Honor pleases, we have an answer. The witness says "it's possible," and I assumed that counsel was not going to try to build anything from that. Now, I object to the question.

The Court: I will sustain the objection.

Q. Captain Darrigan, I am handing you Exhibit 2-A and I want you to assume, sir, that that is a copy of a section of the blueprint of the S.S. Mormacwind, of the main deck, here referred to as the shelter deck, the aft section thereof, essentially as she appeared on May 8th of 1960.

Now I am going to ask you to assume the following facts with regard to the markings that you see there.

First there are the various chocks which have arrows leading to them around on both sides, the starboard and the portsides of the vessel.

Now from the stern going forward there are four sections in red. Each of those lines refers to a section where there was rope flayed out on the afternoon of May 8, 1960, and also, or underneath the rope, there were wooden gratings underneath that rope.

There has been testimony that in the area behind this green line that is somewhat further forward than those for red lines there were gratings placed that covered approximately fifty per cent or so of the stern area.

[fol. 25] In any case, the area where the four red lines, where the lines were, was covered with gratings.

Now I want you to further assume, Captain, that at the circular portion where there is an R in the circle, right up there, that there was a Manila line coiled there which Manila line—this is, of course, just a short section of it—the line was much lengthier—which line was of a dimension similar or a shade thicker than the line that I am presently showing you, Exhibit 29.

Now I will ask you to further assume that the red section further forward which has the word "wire" next to it, there has been testimony that a spring wire was laid there and that the slanted lines in front of that, I believe black—

Mr. Friedman: I must say, your Honor, that I am slightly color blind.

Q. (Continuing)—indicates an area where there may have been some deck cargo, what has been referred to as red-label cargo in that area, and I think that is all I need to ask you to assume now as to the layout of the vessel.

Now, Captain, I would like you to assume that on May 8, 1960, in the afternoon, at approximately one-thirty in the afternoon, this vessel was in the process of coming into the New York Harbor and of being tied up at a berth known as Pier 23 in Brooklyn.

Now I would like you to assume that aft there were several men—part of the aft gang, docking gang—who were in charge of the third mate, who was present and in charge there, that a line was put out, among others, at the aft chock here that has a No. 1 near it, and also at the other aft chock, which also has a No. 1 next to it, and that then the third mate gave an instruction that the Manila line that I just indicated of that type, which was coiled at the area, the orange circled R, be put out through a chock that was farther forward, which has the No. 2 next to it.

[fol. 26] Do you see that, Captain?

A. Yes.

Q. Now I want you to assume that we have measured that on this scale drawing here and that the distance from the coiled rope to this chock No. 2 was approximately 56 feet.

Now my question to you is this, Captain: Assume all those facts and assume that the deck between where the rope was coiled in chock No. 2 was in all respects a perfectly normal deck; that there was no particular obstruction between the two points and assume that it was dry and had nothing unusual in terms of its surface. I want to assume that.

Now, Captain, do you have an opinion as to what safe and prudent seamanship would call for as to how many men should be assigned to the task of taking the line from where it was coiled at the mark R to the chock No. 2 and putting it out to that chock?

Mr. Kimball: Objection, if your Honor pleases. I would like to be heard at some length on this unless your Honor is going to sustain the objection.

The Court: Well, I think you should be heard. I just think that possibly the matter should be discussed at the side bar.

Mr. Kimball: I think it would be better, if your Honor pleases.

(The following proceedings took place in the robing room:)

The Court: Mr. Kimball, would you state the grounds of your objection?

Mr. Kimball: Thank you, sir.

The first ground of the objection, if your Honor pleases, is that the question seeks to elicit testimony which is irrelevant and immaterial in that on the basis of the evidence thus far in the case it appears as a matter of law that any [fol. 27] claimed shortage of personnel was not a proximate cause of the accident.

Secondly, if your Honor pleases, the testimony thus far elicited shows that at the time the accident occurred there was no shortage of personnel at the after docking station; indeed, although they had no more men than would normally be required at that time of day, they had more superior manpower than they normally would have had because the ordinary seaman, I believe, on the eight-to-twelve watch, was in the ship's hospital and in place of him, according to the evidence thus far in, were Mr. Chowaniec, an able-bodied seaman, a superior rating, who, by his own admission, is a competent merchant mariner of considerable experience, size, strength, and so forth.

So, if your Honor pleases, these are the two primary bases for my objection.

Additionally I would submit to your Honor that an insufficient foundation has been attempted to be laid for elicit-

ing an opinion from this witness on this particular matter in that it seems perfectly obvious that a great many more factors would have to be known by anyone before they could answer the question.

The situation is necessarily a varying one, depending upon the manpower available, what the other men were doing, what the docking situation was at the time, the nature and extent of such emergency as there may have been for the work to be required, and so forth.

It seemed perfectly apparent that if for any reason an emergency had arisen in connection with docking the vessel then the vessel would come first over and above any manpower situation that might have existed and, therefore, un-
[fol. 28] der that hypothetical situation, the safe practice would dictate that they use anybody who might happen to be handy to avoid, for example, the vessel plowing into the pier and doing extensive damage to herself, her cargo, her personnel, and heaven only knows what.

Without knowing all of the factors, the relevant factors which the mate should have taken into consideration at the time, I respectfully submit to your Honor that it would be improper to permit this witness to speculate as to what safe practices may have been under some theoretical situation which we don't know anything about because it is in his mind.

The Court: I don't want to interrupt but this is a hypothetical question that he is asking now. You are at liberty to ask your own hypothetical question on cross examination.

On a matter of relevance, I will permit the question.

One of the claims made here is, as I understand it, that failure to supply a sufficient number of men on this particular operation, assuming that that had any bearing on the injuries to the plaintiff, constituted unseaworthiness.

There has been testimony on the subject as to the number of people who were there, whether they were available. These are matters in part for summation to the jury, but I think so far as the question is concerned that I will allow it and I also will allow, so that we may not have to go

through a further conference in the robing room, that if a further question is asked along the lines referred to in the case there is a decision by Judge Friendly that Mr. Friedman has submitted, and while I am expressing no opinion myself I will allow the question, and you are familiar with what I am talking about.

[fol. 29] Mr. Kimball: No, I am not, sir. I don't know what case Mr. Friedman has cited.

The Court: Well, I assumed that he had been giving you copies of memoranda that he submitted to the Court.

Mr. Friedman: Of course I did. I don't know whether he reads them.

Mr. Kimball: Well, whatever it is.

But, if your Honor pleases, I will make my objection at the time.

The Court: All right. I thought if you were familiar with that—

Mr. Kimball: Would your Honor permit me a voir dire on this man at this time to find out whether—

The Court: He has had experience in docking and things of that nature.

Mr. Kimball: Yes.

The Court: As to his qualifications, I will permit it.

Mr. Kimball: How about whether there were other factors which he would necessarily have to know in order to answer the question?

The Court: No.

Mr. Friedman: Your Honor, this man has testified—I tried to be as brief as possible, though it does me no good in this case—as to his qualifications.

Now if your Honor thinks there is such a question still overhanging a man with his type of qualifications then I will evoke it myself. I do not want Mr. Kimball to intrude into my direct examination. I think his qualifications as stated do not call for any voir dire at this point.

The Court: Well, it might, as to the qualifications, but I thought that you have covered it fairly well—his qualifications.

[fol. 30] Mr. Kimball: I don't want a voir dire on his qualifications but I would request permission, on the voir dire, to inquire as to whether there aren't thirty or forty or fifty factors which he would necessarily have to take into account before he could answer that question.

The Court: No.

Mr. Kimball: Now your Honor tells me I can do that on cross examination but I respectfully submit, sir, that by that time the damage will have been done and while it is theoretically nice to ask the jury to erase things from their minds as a practical matter they cannot.

The Court: No. Don't misunderstand me. It is in the nature of cross examination, but it would be permitted immediately following the witness's answer. You could then examine him as to that. This is the way I have always understood it. You have your qualifications of your witness. You have had that. Assuming they are satisfactory, then you have your hypothetical question. That has been asked and ruled on.

Now after he answers you may then—whoever has called him—examine as to the basis.

Mr. Kimball: That is exactly what I intended to do.

The Court: Examine him as to the basis for his opinion. You may bring that out on your examination.

Then you have whatever expansion results from the findings of the basis and then you have your cross examination. That is the standard method which I don't feel I am going to depart from.

Mr. Kimball: Would your Honor, then, ask that there be included in Mr. Friedman's hypothetical question the [fol. 31] facts or the substance of the testimony of Chowaniec, that he had this quantity of line on his shoulders and went down the deck with it and later on, when he got excited, he went back and he tossed portions of this line into the air with one hand and that later on the plaintiff in this case, who supposedly had fallen and injured his back, was observed taking coils of line out one-handed? That is all in the case, I submit.

The Court: I know but counsel has a certain choice in what he includes in his hypothetical question and he is not required to include everything as long as he doesn't include anything that is not true.

In other words, he cannot include something there that is not in the evidence.

Mr. Kimball: I submit equally well, your Honor, he cannot exclude from this hypothetical question anything which is in the evidence which has a relevant bearing upon the matter.

The Court: Well, there we part company. I disagree with you on that. There we part ways.

Mr. Friedman: Your Honor, I hate to prolong this but it may save us another conference.

I want to point out that our thrust, the thrust of our theory here, is that there was an insufficient number of men assigned to this particular task of getting the rope from the circled R to chock No. 2. There could have been a hundred men on the stern, or five. It is a question of how many men were assigned to this particular job. That is No. 1.

No. 2: I would like to point out to the Court that our theory here relates to the manpower. It has nothing to do with the manpower available for the job and it has to do [fol. 32] with whether enough men were provided. And as to that the de Lima case, your Honor, is right on the point, regardless of whether there were six men in the gang or what other considerations or factors there were: Should this job have more than two men? That is the thrust of our theory. I don't think other factors come into play.

Mr. Kimball: The thrust of our position is that if they had sufficient men at the aft end of the docking station, but if the third mate did not utilize those men, distribute them among the two tasks being done, in the proper manner, then that would only impose liability upon the defendant if the plaintiff could show, No. 1, that the third mate was negligent, or, No. 2, that the third mate was so incompetent as to cause the vessel to be unseaworthy.

Now neither of those things has been shown, nor will they be shown, because they cannot be shown. They cannot show that this third mate was negligent in assigning, we will say, two men to this particular line without showing what other demands were being made upon the mate at that time. For all anybody knows he may have had seven tugs colliding with him on the portside; he may have had dozens of other needs and demands placed upon him. He may have received orders from the bridge to do precisely what he did for good reason or bad reason.

But there can be no proof of the mate's negligence and I don't think counsel would even attempt to prove that he was incompetent.

So that is the defendant's position on this particular question, your Honor.

The Court: Very well. We will resume.

(The following took place in the hearing of the jury:)

[fol. 33] The Court: The reporter will read back the question.

(Question read.)

A. Yes.

Q. What is your opinion?

Mr. Kimball: Same objection.

The Court: Same ruling.

You may answer, Captain.

A. I would say to drag a line sixty feet or more you would need three or four men at least of that type and weight.

Q. Captain, just so that we are clear, the measured distance from the center of the R is 56 feet. Does that change your answer at all?

A. No, no.

Q. Now can you explain to us, Captain, the basis or the reason for your opinion?

A. Well, these lines are heavy. I would—just looking at this I would figure that that is an eight-inch mooring line and to drag it along the deck or along the street, there is a lot of physical strength needed.

• • • • • • •

Q. Captain, can you tell me with regard to the basis of your opinion, does the direction of the movement of the rope play any role?

A. No. The distance is the same.

• • • • • • •

Q. Now, Captain, is there a phrase with regard to the use of rope known as calling or called rope, and also a phrase known as flaked?

A. Yes, sir.

Q. What are these two phrases? What do they mean?

A. Well, a flaking of the line means that the line is taken from the coil and flaked along the deck, which is more convenient to handle when you are mooring the vessel.

[fol. 34] Q. Well, when it is flaked, Captain, what does that mean? Is it still in a circular coil, is it in some sort of straight-line position, or what?

A. Yes. It is more or less in a figure-of-8 line, but it might extend eight, ten, fifteen feet along.

Q. And is the line laid, when it is flaked, on top of the other strands or is it one level?

A. On one level.

Q. And in terms of making ready for a mooring or docking operation, customarily, Captain, where is the line flaked in terms of the chock that is going to be used with that particular line?

Mr. Kimball: Objection, if your Honor pleases.

The Court: What is the basis of the objection, Mr. Kimball?

Mr. Kimball: Well, one of the things, if your Honor pleases, is that the captain is not being told that this is new line.

The Court: I assume that this is a matter that you will bring out on cross examination.

By Mr. Friedman:

Q. Right now we are talking about customarily, Captain, if you would be so kind.

Customarily can you tell me where the line is flaked out in terms of distance from the chock to be used?

A. It is customary to flake the lines as near the chock as possible.

Q. And what is the purpose of that?

A. So that it is easy to handle.

Q. And who in the hierarchy of the ship's personnel customarily is responsible for seeing to it that the line is so flaked out?

A. The officer in charge of the mooring deck.

Q. And in the case of the S.S. Mormacwind on May 8, 1960, as to the stern or aft section, that would be the third mate?

A. I said it was, sir.

[fol. 35] Q. All right. Now this flaking out of the line customarily, when is it done in terms of the time period of the docking operation?

A. Well, I would say about twenty minutes before you were close to the pier. That would give you a chance to know which side you are going to moor to the dock and you could flake your lines accordingly.

Q. Now, Captain, customarily would the officer in charge of the particular docking gang be responsible to know and to determine fifteen or twenty minutes before he actually started putting out the lines just which chocks were going to be used in the docking operation?

A. I would say yes.

Mr. Kimball: Objected to, if your Honor pleases. There is no basis for that.

The Court: This is customarily.

Mr. Kimball: I object to it.

The Court: What was the custom? That is what I understand the question was.

Is that not so, Mr. Friedman?

Mr. Friedman: Yes, customarily what would be the procedure.

Q. Now I am going to ask you, sir, to assume the same facts that you previously assumed about the S.S. Mormacwind. I won't take your time or the time of the Court and the jury to repeat them, and I am going to ask you to assume that the docking operation actually began aboard the S.S. Mormacwind on May 8, 1960, in the sense that the first lines were put out through the chocks that are indicated by the No. 1 and that after these lines had been put out through the chock marked No. 1 it was then that the officer in charge, the third mate, gave an instruction that the chock, some fifty feet or so farther forward, chock No. 2, be used for the docking operation, and that at that time, when he gave that instruction, the line that he di- [fol. 36] rected be used for that purpose was coiled, not flaked, and was situated some 56 feet from the chock.

Now I am going to ask you, Captain, do you have an opinion as to whether that situation and those preparations or lack of preparations for the conduct of the docking operation, whether you have an opinion regarding that as to whether it constituted safe and prudent seamanship.

Mr. Kimball: Objection, if your Honor pleases, for the reasons stated extensively in the robing room.

The Court: Overruled.

Q. Do you have an opinion, Captain?

Just at this time, if you will—I know you are not familiar with our procedure—

The Court: Just answer yes or no if you have an opinion.

Q. At this point I am asking you if you have an opinion on that subject.

A. I have an opinion, yes.

Q. Now, Captain, would you tell us what your opinion is?

Mr. Kimball: Same objection.
The Court: Same ruling.

A. I would say that the carrying of the line, as I said before, still needs three or four men on account of the distance there. It is quite a problem.

Mr. Kimball: I move to strike the answer as not responsive to the question, your Honor.
Mr. Friedman: I will accept that, your Honor.
The Court: Yes. Strike the answer and repeat the question.

Q. Captain, I am directing—

[fol. 37] Mr. Kimball: Excuse me, if your Honor pleases. I wonder if Mr. Friedman might listen to your Honor's request that the question be read again to the witness rather than put another question to the witness. We have one now.
The Court: I just struck the answer. I overruled the objection to the question. If you want to ask another one, I might sustain the objection.
Mr. Friedman: I just want to supplement it by directing his attention to something. That was the purpose, your Honor, rather than taking the time to repeat the question.
The Court: I would prefer to have the reporter read the question.
Mr. Friedman: Surely.

(Question read.)

The Court: I believe the question was as to whether you had an opinion as to whether it was safe and prudent seamanship, or something to that effect.
Mr. Friedman: Yes, with regard to the preparation for the docking operation.

• • • • • • •

A. My opinion is that this was an unsafe operation.

* * * * * * *

Q. Captain, can you tell me what in your opinion safe and prudent seamanship called for under the conditions I have described on the S.S. Mormacwind with regard to coiling or flaking out the line to be used at chock No. 2?

Mr. Kimball: Objection to the question on the grounds stated in the robing room.

The Court: Well, I have overruled the objection on that ground.

[fol. 38] Q. Do you understand the question, Captain?

A. No. Repeat it, please.

(Question read.)

A. Preparing the ship for docking, this line that is coiled there, as indicated, should have been flaked along the deck as close as possible to this chock No. 2.

Q. Thank you.

Now, Captain, assume in addition to what I have already told you that a line to be used, that was coiled at this circled R, was new line rather than old line. Does that in any way change your opinion?

A. No.

Q. Now, Captain, can you tell me what in your opinion would be the effect on the men handling the line in terms of the heaviness or difficulty or lack of difficulty of handling that line and doing that job, of having the line flaked out rather than coiled some 56 feet away?

Mr. Kimball: Objection, if your Honor pleases.

The Court: I will permit it.

A. What is the basis for—

Q. No, listen to the question, if you would, Captain.

(Question read.)

A. The line would be quite easy to handle if it was flaked out.

Q. Now, Captain, in terms of your first opinion here, that three to four men should have been assigned if the line was to be moved some 56 feet, you were not told how many, if any, other men were present at the stern of the vessel at that time, is that correct? You were not told that?

A. No.

[fol. 39] Q. Now, in terms of the number of men that in your opinion safe and prudent seamanship called for assigning to that particular task of moving that line that 56 feet, does it make any difference as to how many other men were in the stern or stern vicinity of the vessel?

A. No.

* * * * * * *

Cross-examination.

By Mr. Kimball:

* * * * * * *

Q. Well, Captain, can I get a positive answer, a yes or no from you, that the number of men depended upon to safely move an object would depend necessarily upon the size of the object?

A. I would say yes.

* * * * * * *

Q. Well, now, Captain, this third mate, who I will ask you to assume had command of the aft docking station of the Mormacwind on this particular date in the afternoon of May 8, 1960, this fellow, would you agree that he would have responsibilities for the safety not only of the men who were under his immediate command but also to some extent for the vessel and everybody and everything on the vessel? Would you agree with that?

A. Yes.

Q. And also for the pier and everything and everybody on the pier, he would have some responsibility for that as well?

A. I would think so.

Q. In the event, as the log shows, that the vessel was being docked with the aid of assisting tugs, he would have this third mate, the responsibility for the safety of the tugs and the men on those tugs?

A. Right.

Q. And, of course, this third mate had a limited number of men under his command, correct?

A. I don't know, sir.

Q. Well, you didn't assume that he had the entire crew back there with him, did you?

A. I don't know how many men he had, sir.

[fol. 40] Q. Well, you would not normally expect the whole crew to be back in the aft docking station, would you?

A. Not generally speaking.

Q. Well, I will ask you to assume that he had back there with him four able seamen and an ordinary seaman and that for this time of day that was the normal number of men assigned to the after docking station on a C-3 vessel such as this. I want you to assume that, if you please.

A. Right.

Q. Five men.

A. Right.

Q. And on this particular occasion there were four able seamen and one ordinary seaman.

Now, don't you agree that what was safe and prudent seamanship at that time with respect to the third mate and the after docking station necessarily depended upon the safety of all of these various things which I have mentioned to you, namely, the men themselves, the whole vessel, and contents and crew, the tugs, the pier; right?

A. Right.

* * * * * * *

Q. Captain, assume an order was received by the third mate to put out an additional line astern, in the normal course of operations the mate would probably have competing demands upon his personnel, would he not?

A. Could be.

Q. And the nature of these competing demands would necessarily have a bearing upon the number of men to be assigned to put up the additional line, would it not?

A. Right.

Q. In the hypothetical question which was given you you were not told of any competing demands upon the mate's available manpower, were you?

A. Are you asking me?

Q. Yes.

A. Well, I don't know what went on.

Q. Well, certainly if the mate, the third mate, received an order from the bridge to assign one or two men to put [fol. 41] out an additional line it would be prudent and seamanlike for the mate to obey that order, would it not?

A. Correct.

* * * * * * *

Q. Now would you say, Captain, that three or four men would be required to handle a line which one man in fact handled in the following manner over what this same man described as a tacky deck surface? In other words, a deck surface which was not in its normal condition so far as footing was concerned. This man handled the line as follows:

And my question is bearing this in mind do you still believe that it would require three or four men in order to flake the line or pass it through the chock, to have what has been described as safe and prudent seamanship?

Reading from page 17—

* * * * * * *

"So I pulled the splice, the ten-foot eye splice, and the large foot of about 15 foot of slack, threw it over one shoulder and the other, and I had Mr. Waldron take off a few turns to give me slack and the momentum so I could proceed down the deck rapidly or as fast as I could to the area marked here 2X.

"Q. Go ahead. Just tell us what you did."

Then it is marked "Q" but I believe it should be "A."

"A. And after I felt that we had sufficient amount of slack, I said, 'Here goes.' Mr. Waldron was about ten feet behind me pulling off the slack of a coiled line which was about four foot of height."

Mr. Kimball: I would like the record to show that the sentence which I am about to read again is the one I have been directed to read by the Court.

"Mr. Waldron was about ten feet behind me pulling off the slack of a coiled line which was about four foot of height."

[fol. 42] Continuing now:

"I proceeded down the deck bulling my way as I was the biggest man on the after section and I could possibly be the strongest."

Now I am going to skip because the part I am interested in for purposes of my question on cross-examination appears on page 20.

"Q. Will you tell us then where you did go?

"A. I stopped about ten to 15 feet from this coil and proceeded to grab with one hand and throw it into the air and pull it with the other hand to get the amount of slack that I thought I would need."

Now bearing that question in mind, which I ask you to accept as being true, do you nevertheless feel that safe and prudent seamanship dictated that three or four men be assigned to take this line from the place marked with the R to the chock marked with the 2?

* * * * * * *

A. I do.

Q. Do you agree that these competing demands on the third mate in so far as the safety of the operation, the

overall operation was concerned, would have a bearing upon which chock was used to put a line out?

A. It is possible.

Q. And, of course, for those on the bridge, those same competing considerations would have a bearing as to which chock would be used for the purpose of letting go the mooring lines; is that correct?

A. Correct.

Q. Do you agree that in view of all these competing considerations the appropriate chock to be used would depend upon a great many factors?

A. Yes.

• • • • • • •

Q. Well, the question is do you agree that in five minutes you, a master mariner, could list at least 25 factors which would necessarily have to be taken into consideration by [fol. 43] whoever was in charge of that operation in order to properly dock the ship?

A. I wouldn't say 25.

Q. What about the state of the tide?

A. (No response.)

Q. Would that be a factor?

A. It would be a factor, sure.

Q. What about the condition of the current in that area, would that be a factor?

A. What is the tide? The tide is a current.

Q. I don't know.

A. The same thing; same thing.

Q. Please don't ask me the questions.

The Court: Would the tide be a factor?

The Witness: Sure. Yes.

Q. And Mr. Friedman didn't tell you what the tide was, did he?

A. (No response.)

Q. You don't know know anything about the tide, do you?

• • • • • • •

A. I do. I know about the tide. Nobody asked me about it.

Mr. Friedman: Is the question—so that I understand it, your Honor—is the question as to whether the tide would be a factor in determining whether to use more than two men for the particular task of letting out the line? Is that the question?

The Court: I don't understand it as such.

Mr. Kimball: The question, if your Honor pleases—

Mr. Friedman: There is no relevancy if that is not the question. There is no relevancy to his comment about my not asking him that.

Mr. Kimball: The question, I believe the record will show, is whether the condition of the tide is not a factor which whoever was in command of the operation would necessarily have to take into consideration in properly docking the ship.

[fol. 44] The question assumes that the proper docking of the ship would necessarily involve a determination of which chocks to use, which lines to use, which direction the lines should go, et cetera, et cetera, et cetera.

Mr. Friedman: Your Honor, I object to the question since the only question we have in this case is how many men should have been assigned to move this line, and what other considerations the docking pilot had would have nothing to do with that.

The Court: Mr. Friedman, I will charge the jury as to the law in this case and what they have to consider in this case.

Mr. Friedman: I wasn't meaning, by any means, your Honor, to presuppose the province of the Court. I respect that completely. I just wished to state the grounds of my objection.

The Court: Well, I have noted your objection and it is overruled.

Mr. Kimball: If your Honor will permit me to withdraw and state the same question:

Q. The question is whether in your judgment the condition of the tide would be a factor which, whoever was in charge of this docking operation, ought to take into consideration in determining how to properly dock the ship.

A. Definitely.

* * * * * * *

Q. Now with this suggestion I go back to a question I asked you earlier:

Don't you believe that if given ten minutes you could prepare a list of twenty-five common factors which the person in charge of this operation would necessarily have to take into consideration in order to safely dock the ship?

A. All of that is true, definitely.

[fol. 45] Q. And all of those various factors would have a bearing, would they not, upon whether the order given or presumably given to the third mate to do something was a safe and prudent and seamanlike order?

A. Right.

Q. Is that right?

A. Right.

Q. And similarly those factors would have a bearing upon whether what the mate did was safe, prudent and seamanlike?

A. Right.

Q. Now, in a docking situation it is not out of the question that some emergency situation might arise which would necessitate the use of additional lines, is it?

A. No.

Q. And in the event such a situation arose it is not out of the question that a line would have to be obtained from some place to be put out, right?

A. Right.

Q. In other words, what I am attempting to get from you, if it be the fact, from your opinion, is that in the course of a typical docking operation, because you have got all of these competing factors: You have got a number of

different vessels participating in a common operation; you have got a number of different men positioned at different places attempting to assist in bringing this big—and in that position—somewhat helpless vessel in unexpected events occur which necessitate some change in plan?

A. Right.

• • • • • • • • •

Redirect examination.

By Mr. Friedman:

• • • • • • • • •

Q. Now, Captain, you were asked yesterday about other factors to be considered in terms of the overall docking operation of such a vessel as the S.S. Mormacwind, and there was mentioned to you among other items the tide, the current, the winds, the number and type of propellers, the tugs, the hour, et cetera.

Now, Captain, do any of these matters in your view have anything to do with the question as to the number of men [fol. 46] safe and prudent seamanship call for to be assigned to the particular task of moving the line from the orange-circled R to chock No.2?

Mr. Kimball: Objection, if your Honor pleases.

The Court: Overruled.

A. I would still maintain my story of yesterday that you would need three or four men to move that line that distance.

Q. And does the question of what the tide was at that particular time or what the winds were at that particular time have anything to do with it?

A. Under general conditions.

Q. Captain, if you would just listen to my question:

Does the question of what the tide was at the particular time this work was being done or what the winds were have anything to do, in your opinion, with the question of the number of men to be assigned to that particular task?

A. No, sir.

Mr. Kimball: Same objection, if your Honor pleases.
The Court: The same ruling.

Q. Captain?
A. No, sir.

• • • • • • •

Q. In your opinion, Captain, would the question of what the tide was at that time or what the current or what the number of propellers were or any of those factors that were mentioned to you by Mr. Kimball: would they have anything to do with that issue of whether or not the rope should be flaked out? No, sir.

• • • • • • •

[fol. 47] Q. Now, Captain, I show you the log for May 8, 1960. Can you tell me from examining the log how long a period of time it took for the vessel to be tied up at Pier 23 on May 8, 1960?

• • • • • • •

Q. You don't have to read it. I am asking you, because the entries are in nautical terms, can you from reading the log tell us how long it took them to tie up the vessel on May 8th.

A. Eleven minutes.

Q. Now customarily, Captain, if any emergency occurs during the course of a docking operation related to the docking operation, customarily, Captain, would an entry be made in the deck log?

Mr. Kimball: Objected to, if your Honor pleases. I don't know what "emergency" means in relation to entries in the deck log.

The Court: I think the captain can state what an emergency is or what is an emergency.

If you want to ask him what he considers an emergency, you may ask him if that would be entered in the deck log.

Mr. Friedman: I selected the phrase because Mr. Kimball used it just that way without any further definition in his cross-examination.

Shall I proceed with the question as it is?

The Court: Yes.

Q. I believe you may answer, Captain.

A. If any emergency arose while the docking operation was in progress, it would be entered in this log book.

Q. If I recall correctly, I believe that Mr. Kimball asked you the same question with regard to any unusual event or events related to the docking operation.

[fol. 48] Mr. Kimball: Same objection, if your Honor pleases.

The Court: Same ruling.

Q. And I put the same question to you—

The Court: These are unusual events relating to the docking operation.

Mr. Friedman: Related to the docking operation.

Q. If any unusual events related to the docking operation occurred would they be customarily entered and recorded on the deck log?

A. Yes, sir.

Q. And, Captain, is there any entry that in your opinion reflects an emergency or unusual event relating to the docking operation recorded in the deck log of the S.S. Mormacwind on May 8, 1960?

A. No, sir.

Q. What significance, if any, do you attach, Captain, to the fact that the vessel was, according to its own log, tied up at the pier in eleven minutes?

A. Very good, sir.

Q. I am sorry?

A. That is a very quick docking, I would say, very quick.

Q. Would that log book indicate to you, Captain, that it was essentially a smooth operation?

A. Yes, sir.

Q. Captain, you were told on cross-examination that there were five men in addition to the third mate back aft in the course of this docking operation and they were under the command of the third mate, who was also there.

I believe you were also told that Mr. Waldron and the other man working with him, who was Mr. Chowaniec, on the particular line in question, were working on the starboard side of the vessel.

Now I want you to assume that the mate has stated—well, in any case, assume now, if you will, Captain, that at [fol. 49] the time these two men, Mr. Waldron and Mr. Chowaniec, were assigned to handle this line and put it out through chock No. 2, the other three men under the supervision of the third mate in the aft gang were not occupied with other tasks at that moment, and given that assumption, Captain, do you have or can you tell me whether that assumption has any effect on the opinion that you expressed earlier, that it was not safe and prudent seamanship to assign only two men to do the particular task Mr. Waldron was engaged in.

Mr. Kimball: Objection, if your Honor pleases.

Mr. Friedman: Your Honor, I would just like to indicate that I intend, after this question, to immediately—

The Court: Come up to the side bar.

Mr. Friedman: Surely.

(The following took place out of the hearing of the jury:)

Mr. Friedman: I intend, your Honor, after this question, to immediately put to him the other assumption regarding the three men, that they were completely occupied with other tasks, and I submit that the proof will be as follows—

The Court: He has already testified that the number of men available or not available would not affect his judgment. Now you are just asking him all over again—

Mr. Friedman: There is a reason for it, your Honor, and let me explain it, if I may. The proof I intend to elicit is this:

If the three men were not fully occupied then there is negligence on the part of the third mate in not directing one or more of those three to help Chowaniec and Waldron [fol. 50] If, on the other hand, the three men were fully occupied at the time, then the ship was short-handed back aft in the course of this docking operation.

Now, your Honor, that is the important point to bring out, that either way there is negligence or undermanning which, I respectfully submit, the Court will have to decide as a matter of law what the charge should be to the jury, that that would constitute unseaworthiness. That is the purpose of my question. It was brought out—the legal issue was remarked upon in the robing room sometime yesterday, and that is the sole point of these two questions; and then I am through with this witness.

The Court: All right. I will permit him to ask the question over your objection.

Mr. Kimball: Thank you, sir.

(The following took place in the hearing of the jury:)

By Mr. Friedman:

Q. Captain, given the various assumptions you have had before and, as I say, adding to that the assumption that the other three men—

The Court: Mr. Friedman, what are these assumptions, because we have had a lot of assumptions and it might be better for the jury to know what they are.

Mr. Friedman: All right, your Honor.

Q. Assume that on May 8, 1960, the vessel was being docked at approximately one-thirty in the afternoon at Pier 23 in Brooklyn and that Mr. Waldron was a part of the aft docking gang under the supervision of the third

mate and that there were four other men back aft in addition, making a total of five men, plus the third mate.

[fol. 51] Assume that two lines were put out through the chocks indicated with the No. 1 towards the stern of the vessel and then there was an order by the third mate that another line be put out through chock indicated as No. 2, which is farther forward.

Assume that the mate directed that the line to be used for that purpose was an eight-inch or a shade thicker line of the type that I showed to you yesterday and that that was coiled, that line was coiled approximately 56 feet from chock No. 2, that the mate instructed these two men to use; and that he assigned but those two men, Mr. Waldron and another man, Mr. Chowaniec, to do that job.

Now I am asking you to assume, if you would, that at the time that the mate instructed just Mr. Waldron and Mr. Chowaniec to do that particular task of putting out the line to chock No. 2 the other three men were not engaged in some task or tasks from which they could not be spared:

And I am asking you, sir, assuming that, do you have an opinion as to whether the mate's instruction to Mr. Waldron and Mr. Chowaniec to handle the line as described constituted safe and prudent seamanship.

Mr. Kimball: If your Honor please, I object.

The Court: Overruled. The objection is overruled.

I assume you rose to make an objection.

Mr. Kimball: I did, sir. I want to point out to your Honor that the assumption that the other men were not engaged is contrary to the evidence and violates common sense, which is another basis of my objection.

The Court: You may answer.

A. If the three men were not there then they were shorthanded at this assignment. Otherwise—

[fol. 52] Q. Captain, I hate to interrupt your answer but the question assumed that the three men were at the stern in the aft section but that they were not at that time oc-

cupied at tasks from which they could not be spared. That is the assumption at this time.

Now was the mate's instruction assigning just the two men, Chowaniec and Waldron, in your opinion, safe and prudent seamanship?

A. No, sir.

. . . . . .

Q. Now would you tell us the basis for that opinion, sir.

A. Many things could enter into this.

First I would say that they were shorthanded in that particular assignment. Again, I would say the officer was negligent in not assigning another man to help these other two men with that line.

Q. Now, Captain, I am going to ask you to take these exact same assumptions that I submitted to you just a moment ago without repeating them except that I am going to change the last assumption. I am going to ask you to assume that the other three men were in fact occupied with tasks at that moment that the mate assigned Chowaniec and Waldron to handle this particular line. They were occupied with tasks from which they could not be spared. Do you understand that? I am changing the assumption just the other way around. Do you understand that, Captain?

A. (No response.)

Q. Now, you have an opinion?

A. Yes.

Q. Do you have an opinion as to whether the situation then present under those circumstances constituted safe and prudent seamanship?

A. It might happen once in a while but I wouldn't consider it prudent and general practice.

Q. Could you explain your answer, Captain, so that I understand it?

A. I mean, there might be a case where you have to do a job with two men where it takes four to do it but that only happens once in a while.

. . . . . .

[fol. 53] Q. Now, Captain, assuming the layout and circumstances of the S.S. Mormacwind, as I say, assuming that the other three men were occupied at the time the chief mate gave the instructions to Waldron and Chowaniec with regard to this line, with the other two lines that had been previously put out through chock No. 1, there was testimony or indication that there had been an offshore line put out through the starboard side; assume they were occupied with that—one or more of those other lines—do you have an opinion as to whether the S.S. Mormacwind, on May 8, 1960, at that time, was sufficiently manned with regard to the aft deck docking gang?

You understand the question, Captain?

A. Yes, sir.

Q. And the answer, please?

A. No, sir. The answer is no.

Q. And, Captain, this is, I hope and I believe, my last question—

Mr. Friedman: Perhaps my record in not clear.

Q. You have told us that you have an opinion. What is your opinion, Captain?

A. On this mooring problem?

Q. What is your opinion as to whether the vessel was sufficiently manned with regard to the aft deck docking gang?

A. I said no.

Q. Just tell us the basis for that opinion. I don't want you to repeat anything you have told us before. Very briefly, what is your opinion? And that is my last question to you, Captain?

Mr. Kimball: His opinion is no and I assume that the basis is that there were not enough men, so I object to the question.

Mr. Friedman: I will accept Mr. Kimball's assumption as being what the captain would answer, and I have no further questions.

[fol. 54] Mr. Kimball: I have no questions.

Mr. Friedman: You are excused, Captain. Thank you.

(Witness excused.)

* * * * * * *

(The following took place outside the hearing of the jury:)

MOTION FOR DIRECTED VERDICT

Mr. Kimball: If your Honor pleases, the defendant respectfully moves the Court for a directed verdict in the defendant's favor on the various and alternative grounds of failure of proof, insufficiency of proof, no issue of fact as to the non-liability of the defendant upon which reasonable men could disagree, and that the evidence conclusively establishes as a matter of law that the defendant is not liable—each and all of those alternative theories being directed to the following claims individually, as I understand the claims.

First the defendant moves in respect of the plaintiff's claim that the vessel was unseaworthy by reason of claimed shortage of personnel.

In support of this motion I would respectfully point out to the Court that, to begin with, the vessel was not short of personnel because according to the Coast Guard certificate she was only required to carry on deck in the unlicensed department six able and three ordinary seamen, and in addition to the six able and three ordinary seamen she had a bosun and two deck utility men so her articles, which are a plaintiff's exhibit, show that she had three more unlicensed deck crewmen than her certificate required.

Secondly, that she did have aboard at the time of the alleged occurrence, according again to a plaintiff's exhibit, the articles, every one of the deck crew who are shown on the articles.

Lastly your Honor will recall from the testimony—and it is undisputed—that the vessel docking between twelve

[fol. 55] noon and four p.m. or, indeed, between eight a.m. and four p.m., there would, in normal course, be one able seaman from the after docking station at the wheel acting as quartermaster and, accordingly, the full complement on the after docking station between the hours of eight a.m. and four p.m. would consist of five unlicensed members of the deck department under the command of the third officer. Those five would normally be three able and two ordinary seamen.

At the time of this alleged accident, and for some time prior thereto, there were in fact, according to the undisputed testimony, five unlicensed men at the aft docking station, but they were composed of four able seamen and one ordinary seaman, so that in point of fact the vessel was manned aft superior to what would normally be the case in that instead of having an ordinary seaman back there they had Mr. Chowaniec, who not only had a higher rating but, according to his own testimony, he was a very experienced man and qualified sufficiently to serve as a bosun when the regular bosun left the vessel.

So I respectfully submit that for each and all of those reasons your Honor should direct a verdict for the defendant on that particular claim, plus the additional fact that there has been failure, insufficiency, et cetera, of proof of proximate relationship between any alleged unseaworthiness by reason of personnel shortage and the claimed accident.

• • • • • • • •

(The following proceedings took place in the robing room:)

GRANTING OF MOTION FOR DIRECTED VERDICT

The Court: First on the motions made by defendant on which I reserved decision yesterday evening; on the defendant's motions I am granting the motion for a directed [fol. 56] verdict on the unseaworthiness claim with respect to shortage, the alleged shortage of personnel, on the

grounds set forth by defendant, and I am denying the remaining motions.

Mr. Kimball: If your Honor pleases, may I most respectfully, on behalf of the defendant, take exception in so far as your Honor has denied the defendant's motions for a directed verdict.

Mr. Friedman: Your Honor, I, of course, will take exception to the granting of a motion for a directed verdict.

May I also inquire of the Court whether in fact the Court is not dismissing the claim rather than directing the verdict?

The Court: Well, the motion was for a directed verdict. In effect, it is a dismissal of the claim in so far as it is based on unseaworthiness arising from the alleged shortage of personnel.

I have gone over the cases and I don't think on the facts here they are applicable. However, I am not actually dismissing any claim based on unseaworthiness arising out of the existence of wet paint or negligence or on any grounds including the giving of an order which might be considered negligence in the assignment of personnel who made up the complement for the aft docking operation.

* * * * * * *

[fol. 57]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

NOTICE OF MOTION FOR NEW TRIAL

Sirs:

Please Take Notice that upon the annexed affidavit of Theodore H. Friedman, sworn to April 27, 1964, and upon all the pleadings and prior proceedings had herein, the undersigned will move this Court at the Chambers of Hon. Charles H. Tenney, U. S. D. J., Room 607, at the United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York, on the 15th day of May, 1964 at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order pursuant to

Rule 59, F. R. C. P. granting to the plaintiff a new trial, the grounds for such motion being:

1. The error and irregularity of declining to read to the jury the testimony on direct examination of the plaintiff with regard to what he did on the night of May 8, 1960 notwithstanding the jury's request therefor;

2. The failure to submit to the jury the plaintiff's claim of unseaworthiness based upon the alleged failure to provide sufficient manpower for the task of hauling and putting out the rope through the forward chock on the starboard aft part of the defendant's vessel's main deck on May 8, 1960 and the dismissal, as a matter of law, of plaintiff's claim related thereto; and

[fol. 58] 3. That the verdict for the defendant was against the weight of the evidence;

and upon such other grounds as the Court may deem just and proper in the premises.

Dated: New York, N. Y., April 27, 1964.

Yours, etc.,

Henry Isaacson, Attorney for Plaintiff, Office & P. O. Address 38 Park Row, New York 38, N. Y., Telephone No. CO 7-6557;

Phillips, Nizer, Benjamin, Krim & Ballon, Counsel for Plaintiff, Office & P. O. Address 1501 Broadway, New York 36, N. Y., Telephone No. WI 7-7600.

To:

Burlingham, Underwood, Barron, Wright, & White, Esqs., Attorneys for Defendant, 26 Broadway, New York 4, N. Y., Telephone No. HA 2-7585.

[fol. 59]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF THEODORE H. FRIEDMAN, READ IN SUPPORT OF MOTION

State of New York,
County of New York, ss.:

Theodore H. Friedman, being duly sworn, deposes and says that:

1. I am associated with Phillips, Nizer, Benjamin, Krim & Ballon, counsel for the plaintiff, and acted as Trial Counsel in the above entitled action, and am fully familiar with the facts and prior proceedings had herein.

2. This affidavit is submitted in support of plaintiff's motion pursuant to Rule 59, F. R. C. P. for an order granting a new trial, this action having been tried for approximately 2½ weeks before a jury, which on April 16, 1964 returned a verdict for the defendant.

* * * * * * *

Ground 2. Dismissal of plaintiff's claim with regard to lack of sufficient manpower for particular task

28. It cannot be questioned that if a trial court is persuaded that it has committed an error of law in the conduct of the case, it is its duty to grant a new trial.

[fol. 60] 29. In the instant case, this Court took the relatively extraordinary step of dismissing as a matter of law plaintiff's claim as to unseaworthiness because of lack of sufficient assistance in performing his assigned task of hauling rope during the docking operation of May 8, 1960. While it is true that the Court did submit to the jury other aspects of plaintiff's suit, the fact remains that one claim was dismissed as a matter of law in an area where judicial

dismissals and deprivation of jury determination have been viewed with strong disfavor on repeated occasions by decisions of the Supreme Court. Plaintiff's dismissed claim could well have been his only claim, and the question of the correctness of its dismissal cannot be avoided by any reference to the decision to submit to the jury other theories of recovery.

30. This is particularly so because the most appealing claim that the plaintiff had was the one dismissed. The defendant had submitted extensive evidence that the paint on the deck was not still wet on May 8, 1960. It also submitted evidence indicating that all of the other men of the aft docking gang were fully occupied with other urgent tasks at the time the plaintiff and Chowaniec were assigned to hauling the rope and putting it out through the forward chock.

31. There was also evidence that the decision to use this chock may have come from a last minute decision of the pier master as the vessel was finally being placed in position, and that, accordingly, the Third Mate did not have any advance notice or opportunity to prepare for the use of that chock.

32. Thus the claim of negligence with regard to the number of men assigned to the task may have had scant appeal to the jury, even though they may have recognized that the number of men assigned to the job was less than sufficient.

[fol. 61] 33. It is precisely in these circumstances, where the exigencies of maritime hazards creates a risk of injury, that the law of unseaworthiness provides the necessary protection for the seaman.

34. Nor can the issue of lack of sufficient manpower for the particular task involved be turned into one of instantaneous operating negligence. The Third Mate gave his order directing two men to do the job. These two men then set about doing the job. It was the condition of two

men performing a job which three men should have done that constituted the asserted unseaworthiness. Whether that condition was created by a negligent order of an officer or whether, indeed, it had been created by the plaintiff's and Chowaniec's own decision, is of no relevance. If six hands and three backs were what was needed to haul that rope, and only four hands and two backs were doing it, and a man was injured thereby, the jury was entitled to find the vessel liable for unseaworthiness just as it would have been if the rope hauling a heavy load should have been 6 inches but was only 4 inches and broke because of the strain, and thereby injured one of the seamen.

35. Inasmuch as this point clearly involves issues of law, its further discussion will be left to the memorandum to be submitted herewith.

* * * * * * *

Wherefore, it is respectfully submitted that plaintiff's motion for a new trial may and should be granted in all respects.

Theodore H. Friedman.

(Sworn to April 27, 1964.)

[fol. 62]

IN THE UNITED STATES DISTRICT COURT

OPINION OF TENNEY, D.J.—November 9, 1964

Plaintiff moves herein for a new trial on the grounds of three alleged errors arising during the course of the trial.

As to points 1 and 3, the motion is denied.

Point 2 asserts that the Court erred in failing to submit to the jury plaintiff's claim of unseaworthiness based on the alleged failure to provide sufficient manpower for the task of hauling and putting rope through the forward chock on the starboard aft part of the defendant's vessel's main deck.

The following were the uncontroverted facts submitted to the Court and jury:

According to the Coast Guard certificate, the vessel was only required to carry on deck in the unlicensed department six able and three ordinary seamen; and in addition to the six able and three ordinary seamen she had a boatswain and two deck utility men. Her articles thus showed that she had three more unlicensed deck crewmen than her certificate required. At the time of the alleged accident, the vessel had on board every one of the deck crew shown on the articles.

The evidence further showed that, the vessel docking between 12 Noon and 4 P. M., there would in the ordinary course be one able seaman from the aft docking station at the wheel, acting as quartermaster; thus the full complement on the aft docking station during those hours would consist of five unlicensed members of the deck department under the command of the third officer, the five normally being three able and two ordinary seamen. At the time of the alleged accident and for a time prior thereto, there were five unlicensed men at the aft docking station, consisting of four able-bodied seamen and one ordinary sea-[fol. 63] man; thus the place of one ordinary seaman had been taken by an able-bodied seamen.

The alleged unseaworthiness consisted of the apportionment of the five men to do the various operations in that sector. Plaintiff claims that the condition which resulted from the third mate's apportioning of the men, i.e., two men assigned to do the work of three (plaintiff's expert testified that it was his opinion that the work ordered done was a three-four man job), regardless of whether the order was improvident or not, constituted unseaworthiness.

The Court, on the basis of the facts presented and the law, directed a verdict for the defendant on that claim. The Court's decision was based on a decision by Judge Patterson, in *The Magdapur*, 3 F. Supp. 971, 972-73 (S. D. N. Y. 1933), and certain language contained in *Pinto* v.

States Marine Corp., 296 F. 2d 1, 3 (2d Cir. 1961), cert. denied, 369 U. S. 843 (1962) and *Ezekiel* v. *Volusia S. S. Co.*, 297 F. 2d 215, 217 (2d Cir. 1961), cert. denied, 369 U. S. 843 (1962).

On reconsideration, I find these authorities both persuasive and controlling. Accordingly, plaintiff's contention as to point 2 is rejected, and plaintiff's motion is in all respects denied.

So ordered.

Dated: New York, New York, November 9, 1964.

Charles H. Tenney, *U. S. D. J.*

[fol. 64]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 93—September Term, 1965.

(Argued October 27, 1965)

Docket No. 29504

JAMES J. WALDRON, Plaintiff-Appellant,

—against—

MOORE-McCORMACK LINES, INC., Defendant-Appellee.

OPINION—January 31, 1966

Before: Lumbard, Chief Judge, Medina and Smith, Circuit Judges.

Appeal from a judgment and an order of the United States District Court for the Southern District of New York, Charles H. Tenney, Judge.

Plaintiff, a seaman, appeals from a judgment for defendant shipowner in a personal injury case in which, at the close of all the evidence, one of plaintiff's unseaworthiness claims was dismissed, and from an order denying plaintiff's motion for a new trial. Opinion below not reported. Affirmed.

[fol. 65] Theodore H. Friedman, New York, N. Y. (Henry Isaacson, and Phillips, Nizer, Benjamin, Krim & Ballon, New York, N. Y., on the brief), for plaintiff-appellant.

William M. Kimball, New York, N. Y. (Burlingham Underwood Barron Wright & White, New York, N. Y., on the brief), for defendant-appellee.

MEDINA, Circuit Judge:

James J. Waldron, an able seaman and a member of the crew of the SS Mormacwind, fell and injured his back as he and another member of the crew were hauling a heavy manila mooring line along the deck of the vessel during a docking operation. The issue of negligence and several features of the issue of unseaworthiness, as claimed by Waldron, were submitted to the jury who returned a verdict for defendant. One of the unseaworthiness claims against the shipowner having been dismissed and the motion for a new trial denied, the seaman appeals. The sole question before us on this appeal is whether the trial judge committed error when he refused to permit the jury to pass upon Waldron's additional claim of unseaworthiness based upon an order of the third mate that 2 men were to carry the line from where it was coiled on a grating on the deck to a mooring chock approximately 56 feet away. There was expert evidence to the effect that 3 or 4 men rather than 2 were required to carry the line in order to constitute "safe and prudent seamanship." It is not disputed that

the vessel was properly and fully manned and that the crew including the officer who gave the order were in all respects competent to perform their duties.

[fol. 66] The findings implicit in the verdict are: (1) that the order given by the third mate was not a negligent order, that is to say, plaintiff failed to convince the jury that under the circumstances a reasonably prudent man would not have given such an order; and (2) that the vessel was not unseaworthy because the deck was tacky from wet paint or was wet and slippery. No shore workers are involved nor is there any claim of a defect in the vessel or any of its gear, equipment and appliances.

I.

According to the log, the docking operation of SS Mormacwind at her Brooklyn pier was consummated in 11 minutes, between 1:20 and 1:31 P.M. on May 8, 1960. Coast Guard regulations required the vessel to carry on deck, in the unlicensed category, 6 able seamen and 3 ordinary seamen. In fact, she carried a boatswain and two deck utility men in addition. Thus the SS Mormacwind had three more unlicensed deck crewmen than her certificate required and all of them were on board during the docking operation.

Waldron was working in the aft docking gang on the starboard side of the ship, inboard, under the command of Tarantino, the third mate. The usual complement of this gang was 3 able seamen and 2 ordinary seamen. On this particular occasion, Tarantino had under his orders 4 able seamen, including Waldron, and 1 ordinary seaman.

As the operation progressed with the requisite dispatch, the officer on the bridge decided another mooring line was necessary as a spring line and the order was passed on to Tarantino. As all the other men were occupied with urgent tasks connected with the other lines, Tarantino assigned to Waldron and another able seaman, who was exceptionally strong and capable, the task of putting out this new line [fol. 67] "as quickly as possible." The other seaman took

the eye of the line, threw about 15 feet of slack "over one shoulder and over the other," and had reached the chock. Waldron was tugging at the top of the coil, attempting to flake some slack along the deck, when he slipped and fell.

Waldron's position on the particular phase of the claim of unseaworthiness that Judge Tenney refused to submit to the jury was very clear to the effect that "[i]t is a question of how many men were assigned to this particular job." It made no difference how well the vessel was manned. Nor was it of consequence that an adequate number of competent seamen were assigned to the group handling the lines aft under the direction of the third mate. "There could have been a hundred men on the stern, or five." Similarly, he contended that other factors, such as the urgency of getting out the new line, the tasks being performed by the other men, the condition of the current, wind and so on, were absolutely irrelevant to the issue of unseaworthiness, even though they did have a bearing on the issue of negligence.

We agree with Judge Tenney, whose short memorandum opinion is not reported, and we affirm.

II.

The doctrine of unseaworthiness has had a long history. The so-called warranty of seaworthiness in early American law has its roots in contracts of marine insurance and affreightment, under which liability was conditioned on the vessel being "sufficient in all respects for the voyage; well-manned, and furnished with sails and all necessary furniture." 1 Conkling, Admiralty Jurisdiction, 164-5 (1848). A similar requirement, stemming from the ancient codes, was implied in contracts for the carriage of goods and pas- [fol. 68] sengers by sea. Abbott, Merchant Ships and Seamen, 178-9 (1802); see *The Caledonia*, 1895, 157 U. S. 124. This duty to provide a seaworthy vessel was absolute, see *Work* v. *Leathers*, 1878, 97 U. S. 379-80; Abbott, Merchant Ships and Seamen, *supra*, at 178, 181; and, even in its early

foundations, seaworthiness was a threefold concept: the vessel must be "tight and staunch," her gear, equipment and appliances must be serviceable and in good order, and the crew, including the master and his subordinates, must be competent and sufficient in number to man the ship. 1 Parsons, Maritime Law 122 (1859); Desty, Manual of the Law Relating to Shipping and Admiralty, Section 232 (1879); *Lord* v. *Goodall S.S. Co.*, C. C. D. Cal., 1877, 15 Fed. Cas. 884, 887-88 (No. 8,506), aff'd on other grounds, 1880, 102 U. S. 541; *In re Meyer*, N. D. Cal., 1896, 74 Fed. 881, 885; *The Gentleman*, S. D. N. Y., 1845, 10 Fed. Cas. 190, 192 (No. 5,324), rev'd on other grounds, C. C. S. D. N. Y., 10 Fed. Cas. 188 (No. 5,323); *Tait* v. *Levi*, [K. B. 1811] 14 East 481.

For a variety of reasons, historical, ethical, sociological and others, we should not be surprised to find that the interests of cargo owners and passengers were paramount in the early days just referred to. Humanitarian considerations were not in vogue. Although the unseaworthiness of a vessel gave a seaman the right to abandon ship without penalty and to be paid his wages, see *Dixon* v. *The Cyrus*, D. Pa., 1789, 7 Fed. Cas. 755 (No. 3,930); *Rice* v. *The Polly and Kitty*, D. Pa., 1789, 20 Fed. Cas. 666 (No. 11,754), and mariners were entitled to maintenance and cure for injuries suffered in the service of the ship, see *Harden* v. *Gordon*, C. C. D. Me., 1823, 11 Fed. Cas. 480 (No. 6,047), the early maritime law afforded no remedy by way of compensatory [fol. 69] damages for personal injuries. See Lucas, Flood Tide: Some Irrelevant History of the Admiralty, 1964 Supreme Court Review 249, 299; Smith, Liability in the Admiralty for Injuries to Seamen, 19 Harv. L. Rev. 418, 431 (1906).

From 1903 and the much discussed dictum of *The Osceola*, 189 U. S. 158, through the Jones Act in 1920, 41 Stat. 1007, 46 U. S. C., Section 688, the long series of longshoreman cases down to *Mitchell* v. *Trawler Racer, Inc.*, 1960, 362 U. S. 539, and beyond, there has developed a vast body of

federal law concerning the right of a seaman, or a person performing the traditional duties of a seaman, to recover compensatory damages for injuries caused by the unseaworthiness of the vessel. It no longer matters in these personal injury cases whether the unseaworthy condition was caused by the negligence of the shipowner or anyone else. The rule that the so-called warranty applies only to the vessel as she left her home port at the commencement of the voyage, which posed the problem we found so vexing in *Dixon* v. *United States*, 2 Cir., 1955, 219 F. 2d 10, has, at least in some respects, been blown away by the winds of time. But the basic threefold concept of a sound ship, proper gear and a competent crew has remained unchanged. Each of these contributes in a special way to provide "a vessel reasonably suitable for her intended service." *Mitchell* v. *Trawler Racer, Inc.*, 1960, 362 U. S. 539, 550, *supra*. It may therefore be profitable briefly to examine the developments in the maritime law applicable to each of these three separate but complementary phases of the warranty of seaworthiness.

Little need be said concerning the requirement of a ship "tight and staunch," as the 1936 Carriage of Goods by Sea Act, 46 U. S. C., Sections 1300 ff., has cut down the shipowner's duty to the exercise of due care only with respect [fol. 70] to cargo owners. We have found nothing to indicate that the duty to furnish a sound ship is less than absolute vis-à-vis members of the crew. Pertinent illustrations are cracked plates, *McGee* v. *United States*, 2 Cir., 1947, 165 F. 2d 287, the falling of a rotted signal mast, *Nagle* v. *United States*, S. D. N. Y., 1953 A. M. C. 2109, blobs of grease or spots of oil on the deck or on ladders, *Yanow* v. *Weyerhaeuser S.S. Co.*, 9 Cir., 1957, 250 F. 2d 74, cert. denied, 1958, 356 U. S. 937; *Calderola* v. *Cunard S.S. Co.*, 2 Cir., 1960, 279 F. 2d 475, cert. denied, 364 U. S. 884. Often, and probably generally, the question is one of fact for the judge or jury as in *Mitchell* v. *Trawler Racer, Inc.*, 1960, 362 U. S. 539, *supra*, where there was fish gurry on the ship's rail.

See also *Blier* v. *United States Lines Co.*, 2 Cir., 1961, 286 F. 2d 920, cert. denied, 368 U. S. 836. But there must always be proof on the basis of which a finding of unseaworthiness can be made.

It is with respect to the ship's gear, equipment and appliances that the most significant developments along liberal lines have taken place. It now makes no difference that other safe gear was available but not used. See, e.g., *Mahnich* v. *Southern S.S. Co.*, 1944, 321 U. S. 96. Shore workers, including longshoremen and others performing tasks traditionally the work of seamen, became entitled to the benefits of the warranty of seaworthiness. *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U. S. 85. And the doctrine has been applied to them even if the defective gear was supplied by the stevedore who brought it aboard ship. See, e.g., *Alaska S.S. Co.* v. *Petterson*, 1954, 347 U. S. 396, affirming 205 F. 2d 478 (9 Cir., 1953). Even if the gear or appliances were not defective, a maladjustment might make them dangerous and the vessel could be found unseaworthy. [fol. 71] *Crumady* v. *The Joachim Hendrick Fisser*, 1959, 358 U. S. 423. So also with a stuck valve that could only be "broken" by the use of tools or several men working together. *American President Lines, Ltd.* v. *Redfern*, 9 Cir., 1965, 345 F. 2d 629. So also with a portable aluminum ladder leading to the hold which slipped out of place and fell due to the movement of the ship, despite the fact that an officer had placed a man to hold it and had told him to keep watch over it. *Reid* v. *Quebec Paper Sales & Transp. Co.*, 2 Cir., 1965, 340 F. 2d 34. Other instances of dangerous conditions caused by defects in, or analogous improper use of, various types of gear and equipment could be multiplied.[1]

---

[1] *Grillea* v. *United States*, 2 Cir., 1956, 232 F. 2d 919, 922, refers to the question "whether a *defect in hull or gear* that arises as a momentary step or phase in the progress of work on board should be considered as an incident in a continuous course of operation" (emphasis supplied). See also *Ferrante* v. *Swedish American Lines*, 3 Cir., 1964, 331 F. 2d 571, petition for cert. dismissed, 379 U. S.

Many of the cases above referred to, and others, have been cited in appellant's brief. We are urged to take the position in this case that the principles of these gear and equipment cases are applicable here on the theory that any condition aboard ship that is of potential danger to the members of the crew is necessarily a condition of unseaworthiness, irrespective of how it came into existence and, of course, irrespective of any negligence or fault on the part of the shipowner or his agents or the officers or other members of the crew.

The reason we cannot do this is inherent in the traditional triple concept of unseaworthiness. With respect to the crew, including the officers, all that is or has been re- [fol. 72] quired is that the vessel be properly manned. That is to say, in order to be "reasonably suitable for her intended service" the vessel must be manned by an adequate and proper number of men who know their business. There is no requirement that no one shall ever make a mistake. If someone is injured solely by reason of an act or omission on the part of any member of a crew found to be possessed of the competence of men of his calling, there can be no recovery unless the act or omission is proved to be negligent. We have found no authority to the contrary. Indeed, this rule seems to us to be based not only on a uniform course of judicial opinion but also on sound reason. In the management of the vessel both at sea and in port, moments of lesser or greater urgency are bound to occur when quick decisions have to be made, and there is always the possibility of what may appear by way of hindsight to be errors of judgment. To alter the rule, in the absence of legislation, would, we think, come close to requiring the shipowner to provide "an accident proof" ship, which the

---

801; *Thompson* v. *Calmar S.S. Corp.*, 3 Cir., 1964, 331 F. 2d 657, cert. denied, 379 U. S. 913.

In *DeLima* v. *Trinidad Corporation*, 2 Cir., 1962, 302 F. 2d 585, there was not only a quantity of oil on the deck of the engine room but the vessel was not properly manned, as 2 of the 3 wipers had left the ship earlier in the voyage and had not been replaced.

teaching of Mr. Justice Stewart's landmark and highly clarifying opinion in *Mitchell Trawler Racer, Inc.*, 1960, 362 U. S. 539, 550, *supra*, specifically negates.

III.

In any event, the uniform current of authority in this Circuit supports the view and we hold that, if the shipowner has furnished a well-manned ship, with a competent crew, there can be no liability for personal injuries caused by an order of an officer of the ship that is not proved to be such as would not have been made by a reasonably prudent man under the circumstances.

In *The Magdapur*, S. D. N. Y., 1933, 3 F. Supp. 971, Judge Patterson decided the precise question here involved and [fol. 73] held that the vessel was not shown to be unseaworthy. The only difference is that 3 men were ordered to move a heavy mooring wire and there was evidence that 6 or 7 men were necessary. The ground of decision was that the warranty of seaworthiness required only an adequate number of competent men in the crew and it was not shown that any of the men on hand and available lacked the skill and ability of men of their calling. "The error was that of the chief officer in assigning to the particular task too few of the men available for work." 3 F. Supp. at 972.

Judge Patterson's ruling in *The Magdapur* was cited with approval by Judge Learned Hand in 1952 in *Keen* v. *Overseas Tankship Corp.*, 2 Cir., 194 F. 2d 515, cert. denied, 343 U. S. 966, in the course of his discussion of the point that, if a member of the crew was incompetent, it was not necessary to prove that the shipowner knew or had reason to believe he was incompetent.

Two later cases in this Circuit also follow the principle that there must be proof of incompetence on the part of an officer of the vessel to warrant a finding of unseaworthiness based upon "allegedly imprudent action by a seaman's superior." *Ezekiel* v. *Volusia S.S. Co.*, 2 Cir., 1961, 297 F. 2d 215, 217, cert. denied, 1962, 369 U. S. 843; *Pinto* v.

States Marine Corp., 2 Cir., 1961, 296 F. 2d 1, cert. denied, 1962, 369 U. S. 843. We adhere to these rulings.

Affirmed.

SMITH, Circuit Judge (dissenting):

I dissent.

The central proposition of the Court's opinion is the rule stated in *Pinto* v. *States Marine Corp. of Delaware*, 296 F. 2d 1 (2 Cir. 1961), cert. den. 369 U. S. 843 and in *Ezekiel* v. *Volusia S.S. Co.*, 297 F. 2d 215 (2 Cir. 1961), cert. den. [fol. 74] 369 U. S. 843, that the doctrine of unseaworthiness does not extend to an injury caused by "an order improvidently given by a concededly competent officer on a ship admitted to be in all respects seaworthy," Gilmore & Black, The Law of Admiralty (1957), 320. Gilmore and Black call such a case "an almost theoretical construct." For two reasons I do not believe this proposition even if it still has vitality should control this case.

First, the proposition evidently refers to cases where there is alleged to be a negligent creation of unseaworthiness. Gilmore & Black cited *Chelentis* v. *Luckenbach S.S. Co.*, 247 U. S. 372 (1918), *McMahon* v. *The Panamolga*, 127 F. Supp. 659 (D. Md. 1955), and *Imperial Oil, Ltd.* v. *Drlik*, 234 F. 2d 4 (6 Cir. 1956), all dealing either with negligence or the negligent creation of unseaworthiness. In this case, however, appellant's claim for unseaworthiness which was dismissed did not depend on negligence; it survives the verdict making it implicit that there was no negligent order given.

Second, appellant does not admit that the ship was "in all respects seaworthy." His case is that the ship was unseaworthy because of the manner in which the rope was used. Whether an appliance or item of gear is serviceable and in good order cannot be determined abstractly. It depends on whether the gear is reasonably fit for its intended use. Inquiry into this involves determining both the purpose for which the gear is used, and the manner in which it is used. This is precisely what occurred in *American*

President Lines, Ltd. v. *Redfern*, 345 F. 2d 629 (9 Cir. 1965), *Ferrante* v. *Swedish American Lines*, 331 F. 2d 571 (3 Cir. 1964), and *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423 (1959). In each of these cases there was unseaworthiness because gear was employed in a manner which [fol. 75] turned out to be improper. In *Ferrante* it was "undisputed that the ship's equipment—the manilla ropes —was fit for its intended use." Yet it was used in an abnormal manner, and injury resulted. And in *Redfern*, the court said, "a stuck sea valve . . . is suitable only if operated by two men; otherwise it constitutes a dangerous condition," and held that the vessel was unseaworthy. In *Crumady* unseaworthiness resulted when a circuit breaker safety device in a winch was set for a stress greater than the same working load on the unloading gear.

I see no meaningful difference between rendering safe equipment defective and unsafe, which is *Crumady*, see also *International Nav. Co.* v. *Farr & Bailey Mfg. Co.*, 181 U. S. 218 (1901), and using equipment in a manner which makes it unsafe, which is *Ferrante*, *Redfern*, and this case.

The fact that the unsafe method arose out of an order does not excuse the ship. An order usually lurks in the background of the act of a seaman in the performance of his duties.

Nor is the fact that the crew was as a whole complete a bar to recovery. In the first place appellant alleges that it was the method of employing gear which made the vessel unseaworthy, not crew size or competence. Secondly, the argument that the crew as a whole was adequate is merely stating in another form the defense rejected in *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96 (1944), that the vessel had available safe equipment which was not used. The unseaworthiness issue in *The Magdapur*, 3 F. Supp. 971 (S. D. N. Y. 1933), was decided solely on the theory that the vessel as a whole was adequately manned. This rationale cannot stand in the face of the development of the doctrine in the intervening years, illustrated by the holding in *Mahnich*.

I would reverse for new trial on the unseaworthiness issue.

[fol. 76]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JAMES J. WALDRON, Plaintiff-Appellant,

v.

MOORE-McCORMACK LINES, INC., Defendant-Appellee.

JUDGMENT—January 31, 1966

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment and order of said District Court be and they hereby are affirmed.

A. Daniel Fusaro, Clerk.

[fol. 82]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[Title omitted]

Before Lumbard, Chief Judge, Medina and Smith, Circuit Judges.

ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING EN BANC—February 7, 1966

Motion granted.

JEL, HRM, U.S.C.JJ.

February 7, 1966

[fol. 86] Plaintiff-Appellant's Petition for Rehearing and Rehearing in Banc (omitted in printing).

[fol. 105]

United States Court of Appeals

For the Second Circuit

[Title omitted]

Order Denying Petition for Rehearing—March 17, 1966

Petition for rehearing denied.

J. E. L., H. R. M., U.S.C.JJ.

I dissent.

J. J. S., U.S.C.J.

Mar. 17, 1966

[fol. 109]

United States Court of Appeals

For the Second Circuit

[Title omitted]

Order Denying Petition for Rehearing In Banc—March 17, 1966

As no active circuit judge has requested that this case be reheard in banc, and as Judge Medina, who is qualified to vote thereon by virtue of 28 U.S.C. § 43 votes to deny, the petition is denied.

J. Edward Lumbard, Chief Judge.

March 17, 1966

[fol. 113] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 114]

SUPREME COURT OF THE UNITED STATES

No. 233—October Term, 1966

JAMES J. WALDRON, Petitioner,

v.

MOORE-McCORMACK LINES, INC.

ORDER ALLOWING CERTIORARI—October 10, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

October Term, 1965

No. 5233

JAMES J. WALDRON,

Petitioner,

against

MOORE-McCORMACK LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THEODORE H. FRIEDMAN
Attorney for Petitioner
Office & P. O. Address
1501 Broadway
New York, N. Y. 10036

INDEX

Table of Cases Cited

Statutes Cited

Other Authorities Cited

BLANK

PAGE

IN THE

Supreme Court of the United States

October Term, 1965

No.

JAMES J. WALDRON,

Petitioner,

against

MOORE-McCORMACK LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the dismissal of the petitioner's claim at the close of all the evidence.

Opinions Below

The opinion of the Court of Appeals is reported at 356 F. 2d 247, and is reprinted in the Appendix *infra* (A1 to A12)*.

The opinion of the District Court for the Southern District of New York (Charles H. Tenney, U. S. D. J.) is not reported and is reprinted in the Appendix *infra* (A13 to A14).

---

* Page numbers beginning with "A" refer to the Appendix to this Petition.

Page numbers ending in "a" refer to the transcript of the Trial Record reprinted as the Appendix to the Court of Appeals. Nine copies of that Appendix have been filed with the Clerk of the Court.

Jurisdiction

The judgment of the Court of Appeals was entered on January 31, 1966 (A15). Extension of time to file a petition for rehearing and rehearing en banc was granted on February 7, 1966. Such petitions were timely filed and were denied, without opinion, on March 17, 1966.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

Whether a seaman is confined to proof of negligence and the application of the doctrine of unseaworthiness is excluded, as a matter of law, when an insufficient number of men are provided for a particular task and an unsafe method of using otherwise safe gear is adopted?

Whether a distinction should be made between an injury arising out of insufficient gear and an injury arising out of insufficient manpower provided for a particular task in determining the application of the doctrine of unseaworthiness?

Whether the fact that there was an overall sufficiency of manpower aboard ship is a complete defense to liability for unseaworthiness for an injury arising out of shortage of personnel in the performance of a particular task?

Whether the manner of use of otherwise safe equipment may give rise to liability for unseaworthiness?

Statement of the Case

On May 8, 1960, respondent's vessel was docking at its Brooklyn pier (2a). Petitioner, an able-bodied seaman, was participating in the docking operation from the stern of the vessel (3a).

The usual docking crew at the stern consisted of five unlicensed personnel and the Third Mate (27a, 55a, 62a). The docking operation commenced at 1:20 P. M. and was over at 1:31 P. M., a total of 11 minutes (11a-12a, 47a).

During the docking operation an additional line was put out from the vessel to the dock from a chock somewhat farther forward in the stern area than was usually employed. Petitioner and another seaman, Walter Chowaniec, were directed by the Third Mate Tarantino to let out this additional line (5a, 18a-19a).

This line was 8-inch manila rope (6a). It was coiled approximately 56 feet from the chock through which it was to be let out (19a, 21a, 26a).

There was evidence that the steel deck surface between the coiled rope and the forward chock was moist from fog and rain, tacky from wet paint, and of difficult and slippery footing (3a, 12a-15a, 20a). The work of putting out the lines had to be, and was being, performed "as quickly as possible" (19a, 48a).

The 56 feet of line, if dry, weighed 104.72 pounds. If wet, it weighed more, and the evidence suggested that it was wet (14a-15a).

While Chowaniec and the petitioner were hauling this line towards the chock, petitioner fell and injured his back (10a, 20a, 21a).

Petitioner's maritime expert, Dewey Darrigan, a seaman for fifty years and a licensed captain for twenty-five years (22a-23a), testified that the particular job of carrying this line from where it was coiled to the chock required "three or four men" (33a, 36a, 42a, 46a, 52a, 53a). In Captain Darrigan's experienced and expert opinion the manila line should not have been used and carried in this manner and the performance of the task by only two men "was an unsafe operation" (37a).

Respondent presented proof that the overall number of seamen aboard the vessel met the Coast Guard minimum requirements and that the overall number of men assigned to the docking crew at the stern of the vessel at the time of the accident constituted the usual number of five men and one officer (54a-55a, 62a).

Respondent's contention was that the other three men were engaged in necessary tasks at the time of the accident, and that its liability, if any, as a matter of law, lay only in negligence with respect to the improvidence, if any, of the Third Mate's order assigning only two men to the task (26a-28a, 31a-32a, 54a-56a).

At the close of the trial on April 16, 1964, the trial court (Tenney, J.) dismissed petitioner's claim of unseaworthiness with respect to the alleged shortage of personnel for the task at hand and refused to submit it to the jury (55a-56a).* Judge Tenney rendered a written opinion upon petitioner's post-trial motion for a new trial (59a-61a), made on April 27, 1964 (58a) and decided on November 9, 1964 (63a). He adhered to his dismissal on the grounds of the decision in *The Magdapur*, 3 F. Supp. 971 (S. D. N. Y. 1933) and "certain language" in the opinions in *Pinto* v. *States Marine Corp. of Delaware*, 296 F. 2d 1, 3 (2d Cir. 1961), pet. for rhg. den., 296 F. 2d 8, cert. den. 369 U. S. 843, 891 and *Ezekiel* v. *Volusia Steamship Co.*, 297 F. 2d 215, 217 (2d Cir. 1961), cert. den. 369 U. S. 843 (Opinion of Tenney, J.; A13-A14).

On the appeal to the Court of Appeals, the dismissal was affirmed by a divided panel, Senior Judge Medina writing for himself and Chief Judge Lumbard and Circuit Judge Smith dissenting (356 F. 2d 247; A1-A12).

---

* Judge Tenney had made a contrary ruling earlier in the trial; i.e., that "the failure to supply a sufficient number of men on this particular operation . . . constituted unseaworthiness' (28a, see also, 31a-32a).

Judge Medina's opinion extensively reviews the law of unseaworthiness and notes the absolute nature of the liability to seamen injured during the performance of their employment duties (356 F. 2d at 249-251; A4-A8). Judge Medina's opinion recognizes that unseaworthiness may be found by a jury although only a portion of the ship's equipment is defective, although safe gear is available but is not used for the particular work involved and although the gear itself is not defective but a maladjustment or misuse of it creates a dangerous condition (356 F. 2d at 250; A6-A7). However, Judge Medina's opinion concludes that these principles of liabiilty apply only to defects, nonuse or misuse of gear or equipment, and do not apply where the dangerous condition arises out of nonuse of misuse of ship's personnel (356 F. 2d at 251-2; A9-A10). His opinion takes the position that with respect to the crew all that is required is that the vessel have an overall sufficiency of manpower, that any failure to provide sufficient personnel for a particular task may not constitute unseaworthiness and that liability, if any, arising out of such circumstances must be based on a proof of personal negligence or "imprudent action" on the part of the officer responsible for allocating and assigning the personnel or proof of inherent incompetence on the part of the officer (356 F. 2d at 251-2; A9-A10).

Judge Smith, dissenting, stated that there were two independent grounds on which unseaworthiness could have been found. The first was that the handling of the otherwise seaworthy manila rope by only two men, when there was expert testimony that three or four men were required, constituted a misuse of otherwise seaworthy gear. According to Judge Smith the creation of a dangerous condition by such misuse of gear was a ground for unseaworthiness liability under principles stated by this Court in *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423 (1959) and directly applicable recent decisions of the 3rd and 9th Circuits (356 F. 2d at 252; A11).

Secondly, upon the conceded principle that an insufficiently manned vessel may be found unseaworthy and petitioner's proof that there was a shortage of personnel provided at the time and place his task was done, unseaworthiness liability could lie. Judge Smith observed that respondent's defense "that the crew was as a whole complete" was "another form [of] the defense rejected in *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96 (1944)" (356 F. 2d at 253; A12). Judge Smith stated that the decision in *The Magdapur*, 3 F. Supp. 971 (S. D. N. Y. 1933) to the contrary, heavily relied upon by the majority (see 356 F. 2d at 251; A9), decided 33 years ago, "cannot stand in the face of the development of the doctrine in the intervening years, illustrated by the holding in *Mahnich*" (356 F. 2d at 253; A12).

Reasons for Granting the Writ

Rule 19(1)(b) of this Court's rules state that among the criteria for granting a writ of certiorari are:

> "where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . . or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; . . . or has so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision."

We respectfully submit that while any one of these grounds presumably is sufficient to justify the issuance of a writ, in the instant case all of these grounds apply, making this case an overwhelmingly meritorious candidate for review by this Court.

Conflict with other courts of appeals

There is direct inter-circuit conflict between the majority decision below in this case on one hand and the opinions of the Ninth Circuit in *American President Lines Ltd.* v. *Redfern,* 345 F. 2d 629 (1965) and the Third Circuit in *Ferrante* v. *Swedish-American Lines,* 331 F. 2d 571 (1964), pet. for cert. dismissed pursuant to R. 60, 379 U. S. 801 and *Thompson* v. *Calmar SS. Corp.,* 331 F. 2d 657 (3rd Cir. 1964), cert. denied 379 U. S. 913 on the other hand.* *Hroncich* v. *American President Lines, Ltd.,* 334 F. 2d 282 (3rd Cir. 1964), *Scott* v. *Isbrandtsen Co., Inc.,* 327 F. 2d 113 (4th Cir. 1964) and *Blassingill* v. *Waterman SS. Corp.,* 336 F. 2d 367 (9th Cir. 1964) are also in conflict with the prevailing position below in this case.

In *Redfern,* the seaman's immediate superior ordered him to go down alone to the engine room and open a large sea valve. The exertion of performing this task injured his back. On a libel tried before a judge alone, he recovered a substantial verdict specifically on the grounds of unseaworthiness (345 F. 2d at 630, 631).

The record on appeal in *Redfern* demonstrates that there was no claim of any overall shipboard shortage of manpower nor was it the "tendency to stick" of the valve that constituted the unseaworthy condition (345 F. 2d at 632). The Ninth Circuit specifically held that the vessel was unseaworthy on the grounds of being "improperly manned" (345 F. 2d at 632), and that the operation of the otherwise seaworthy valve by one man alone, where two men were required, constituted "a dangerous condition" (345 F. 2d at 631), justifying the trier of facts' finding of liability for unseaworthiness.

In the instant case, petitioner was lifting and hauling heavy manila line instead of opening a large sea valve. In

---

* Respondent conceded the conflict with the Third Circuit decisions below. Appellee's Brief to the Court of Appeals, pp. 15-16, a copy of which has been lodged with the Clerk of the Court.

the instant case, the plaintiff's expert testimony stated that 3 or 4 men were required to handle this equipment properly; in *Redfern*, the necessary minimum was two men.

We fail to see any substantive distinction between the *Redfern* case and the case at bar. *Redfern* is the same case of misuse of otherwise proper gear and provision of insufficient manpower as is the instant case.

In both *Ferrante and Thompson, supra,* page 7, the Third Circuit, in extensive opinions, held that where the method of operation and use of safe equipment gave rise to an unsafe condition, liability for unseaworthiness, without any showing of negligence on the part of the shipowner or its employees, could be found. The Third Circuit in *Thompson* quoted and itself emphasized the following from this Court's decision in *Morales* v. *City of Galveston,* 370 U. S. 165, 170 (1962):

> "'A vessel's unseaworthiness might arise from any number of individualized circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. *The method of loading her cargo*, or the manner of its storage might be improper. (Emphasis supplied)'" (331 F. 2d at 65)

In *Ferrante,* the Court's opinion contained a full review of the recent authorities imposing unseaworthiness liability for adoption of improper "method of operation" (331 F. 2d at 577). It noted this Court's decisions indicating the "doctrinal trends" (331 F. 2d at 578) toward completing the protection of the maritime worker injured by an industrial accident. The Court reversed the lower court's dismissal of the libel on the ground that the "stevedore's method" (331 F. 2d at 578) rendered the vessel unseaworthy, stating:

> "Whether the operation is regarded as 'stowage' of the piles of boards as part of the discharge

> process, or the construction of a 'draft', or as the mere use of the ship's equipment—the manila ropes —fact remains that the stevedore 'failed to perform safely, a basis for liability including negligent and nonnegligent conduct alike', and that made the ship unseaworthy." (331 F. 2d at 578)

In *Scott* v. *Isbrandtsen Co., Inc.*, 327 F. 2d 113 (4th Cir. 1964), the longshoreman was injured when a bale that should have been handled by two men was handled by one man and got loose and fell upon him (327 F. 2d at 124). The Fourth Circuit held that this:

> ". . . method of operation may present a factual issue as to whether an unseaworthy condition is created for which the shipowner may be held liable" (327 F. 2d at 125-6).

The Court reversed and remanded for a new trial because of the trial court's failure to submit that issue to the jury (327 F. 2d at 128).

Hroncich v. *American President Lines Ltd.*, 334 F. 2d 282, 285 (3d Cir. 1964) is almost identical to *Scott*, and similarly holds that the method of operation, if improper and unsafe, may constitute unseaworthiness.

Similarly, the Ninth Circuit in *Blassingill* v. *Waterman Steamship Corp.*, 336 F. 2d 367, 368-70 (1964) flatly held that "an improper method of using" sound gear may constitute unseaworthiness, and that it was error for the trial court to refuse to submit such an issue to the jury.

The above-cited recent cases make clear that at least in the Third, Fourth and Ninth Circuits stevedores and longshoremen can impose unseaworthiness liability upon a vessel by ordering or adopting an improper method of work. If such improper method of work, adopted without the control or knowledge of the shipowner's officers,

can impose unseaworthiness liability, *a fortiori*, an improper work method, adopted by a crew member pursuant to a ship officer's directive, may similarly render the vessel unseaworthy.

These cases, finding grounds of unseaworthiness liability upon an analysis and consideration of the human element which by misuse or nonuse converts otherwise safe equipment into dangerous conditions, are obviously of recent vintage. This development of the law in this significant area has not been fully accepted by the Second Circuit, several of whose decisions stand in conflict with that of the other circuits. See *Guarracinno* v. *Luckenbach SS. Co.*, 333 F. 2d 646, 648 (2d Cir. 1964), cert. den. 379 U. S. 946; *Puddu* v. *Royal Netherlands S.S. Co.*, 303 F. 2d 752, 755 (2d Cir. 1962, Clark, J., dissenting), cert. den. 371 U. S. 840; *Pinto* v. *States Marine Corp. of Del.*, 296 F. 2d 1, 7 fn. 6 (2d Cir. 1961), cert. den. 369 U. S. 843, 891.

The decision in the instant case plainly involves direct conflict with the *Redfern, Ferrante, Thompson* and other decisions of three other circuits. These severe conflicts between decisions of courts of appeals on two separate, important and recurring grounds—liability for unseaworthiness for shortage of personnel at a particular time and place notwithstanding overall sufficiency of manpower aboard ship and unseaworthiness liability for an improper method of operation where seaworthy equipment is used in a manner which creates an unsafe condition—make this case, we respectfully submit, an especially strong candidate for the grant of certiorari.

Conflict with Supreme Court authorities

The sole basis for upholding the dismissal below is the claim that notwithstanding the evidence that there was a shortage of manpower at the time and place the work was done, the existence of an overall sufficient complement of

men aboard the ship rendered the claim invalid as a matter of law.*

Precisely this defense was struck down by this Court in *Mahnich* v. *Southern SS. Co.*, 321 U. S. 96, 103-4 (1944). There a mate, without negligence, selected and provided a rope with a latent defect, with resulting injuries to a seaman. Sufficient safe rope was aboard the vessel. This Court held that the concepts of strict liability under the unseaworthiness doctrine:

> "required that safe appliances be furnished when and where the work is to be done." (321 U. S. at 104)

As to the defense that there was sufficient safe rope aboard the vessel, the Court held:

> "nor does the fact that there was sound rope on board to rig a safe staging * * * afford an excuse to the owner for the failure to provide a safe one." (321 U. S. at 103).

The issue here involved may also be analyzed as giving rise to unseaworthiness liability because of a dangerous condition caused by an improper method of operation and misuse of otherwise seaworthy equipment. The decisions below refused to recognize and apply the basic principles laid down by this Court in *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423 (1959).

In *Crumady* stevedores used a winch and cargo loading equipment which had a maximum safe working load of 3 tons and was in good condition, but set the cut-off device at 6 tons (358 U. S. at 425). Although the equipment was not inherently defective and the dangerous condition arose only because of the maladjustment of the safety device,

---

* It is beyond dispute that overall insufficiency of manpower aboard ship constitutes "a classic case of an unseaworthy vessel". *June T., Inc.* v. *King*, 290 F. 2d 404, 407 (5th Cir. 1961); *DeLima* v. *Trinidad Corp.*, 302 F. 2d 585, 587 (2d Cir. 1962); *In re Pacific Mail S. S. Co.*, 130 F. 76, 82 (9th Cir. 1904).

these acts gave rise to an unseaworthy condition, irrespective of whether there was also negligence. This Court stated:

> "The *winch*—an appurtenance of the vessel—*was not inherently defective* as was the rope in the Mahnich case. *But it was adjusted* by those acting for the vessel owner *in a way that made it unsafe and dangerous for the work at hand.* While the rigging would take only three tons of stress, the cut-off of the winch—its safety device—was set at twice that limit. This was rigging that went with the vessel and was safe for use within known limits. Yet those limits were disregarded by the vessel owner when the winch was adjusted. *The case is no different in principle from loading or unloading cargo with cable or rope lacking the test strength for the weight of the freight to be moved.* In that case the cable or rope, in this case the winch, makes the vessel pro tanto unseaworthy." (358 U. S. at 427-8). (Emphasis added.)

Similarly, in the instant case, the Third Mate's adjustment of his work force, by providing only two men to haul or handle a load where the strength of additional men was required, and the method of operation of hauling the rope by only two men, must be deemed to have given rise to a jury issue as to the creation and presence of an unseaworthy condition. See also, *Morales* v. *City of Galveston,* 370 U. S. 165, 170 (1962); Note: *Doctrine of Unseaworthiness in the Lower Federal Courts,* 76 Harv. Law Rev. 819, 828 (1963).

This Court's opinions of the past 20 years have broadly expanded the notion and the coverage of unseaworthiness, as was explicitly noted in *Mitchell* v. *Trawler Racer, Inc.,* 362 U. S. 539, 550 (1960), *Scott* v. *Isbrandtsen Co.,* 327 F. 2d 113, 123 (4th Cir. 1964), *Ferrante* v. *Swedish-American Lines,* 331 F. 2d 571, 578 (3rd Cir. 1964) and Gilmore & Black, *The Law of Admiralty* (1957), p. 253, fn. 12. It is now clear that a failure to provide reasonably safe work-

ing conditions to a seaman, albeit a temporary, slight or uncorrectible failure, may impose strict liability upon the shipowner rather than leave the burden upon the injured seaman alone. See, *e.g., Mahnich* v. *Southern S.S. Co., Inc., supra; Seas Shipping Co.* v. *Sieriacki,* 328 U. S. 85, 92-6 (1946); *Boudoin* v. *Lykes Bros. S.S. Co., Inc.,* 348 U. S. 336, 339 (1955); *Crumady* v. *The Joachim Hendrick Fisser, supra; Mitchell* v. *Trawler Racer, Inc., supra; Michalic* v. *Cleveland Tankers, Inc.,* 364 U. S. 325, 327-8 (1960); *Gutierrez* v. *Waterman S.S. Corp.,* 373 U. S. 206, 213 (1963); *Reed* v. *The Yaka,* 373 U. S. 410, 413 (1963).

The decisions below in the instant case would carve out from the protection of these strict liability principles of unseaworthiness the ordinary, frequently recurring accident case where a low echelon laborer aboard ship is directed, alone or with insufficient help, in the exigencies and possible haste of shipboard employment, to haul, pull, lift or tug a heavy piece of equipment or object aboard ship and is thus injured.

Had the manila line here involved been hauled on a dolly or hand truck of insufficient strength which collapsed, a jury issue as to liability for unseaworthiness would surely have been presented. That the load-carrying mechanism was too weak because of shortage of personnel can, in logic or social policy, dictate no different result.

Inexplicably, Judge Medina's opinion below applies this arbitrary and artificial distinction and insists on denying strict liability protection to the injured seaman if the order involves provision of personnel rather then selection of gear. Such a distinction is precisely contrary to this Court's view expressed in *Boudoin* v. *Lykes Bros. SS. Co.,* 348 U. S. 336 (1955), where it stated that on the issue of unseaworthiness there is:

> "no reason to draw a line between the gear on the one hand and the ship personnel on the other". (348 U. S. at 339)

The extraordinary and arbitrary nature of the decisions below is pointed up by the fact that petitioner's negligence claim was not dismissed, but the unseaworthiness claim was held legally insufficient (56a). Mr. Justice Frankfurter pointed out that "it will be rare that the circumstances of an injury will constitute negligence but not unseaworthiness", *Pope & Talbot* v. *Hawn*, 346 U. S. 406, 418 (1953), and Professors Gilmore and Black have noted that such a circumstance is an "almost theoretical construct". Gilmore and Black, *The Law of Admiralty* (1957), p. 320. The Second Circuit has now extended this "rare" and "theoretical" concept into a systematic barrier to jury determination of this common type of maritime accident. See *Pinto* v. *States Marine Corp. of Del.*, 296 F. 2d 1 (2d Cir. 1961), cert. den. 369 U. S. 843, 891 (1962) and *Ezekiel* v. *Volusia SS Corp.*, 297 F. 2d 215 (2d Cir. 1961), cert. den. 369 U. S. 843 (1962). The *Pinto* decision, adopted by a sharply divided Court (see 296 F. 2d at 8) and relied upon by the trial and appellate courts below (356 F. 2d at 252; A10; A14), has drawn the criticism of commentators * even before its expansion in the instant case, and has not been followed by any of the other circuits.

The petitioner produced proof that additional assistance should have been provided. Nevertheless, the courts below held he was to be denied the right to submit his case to a jury, unless he could prove that the officer at the scene, responding to the shipboard conditions, was inherently incompetent or negligent in directing the urgent work (356 F. 2d at 251-2; A8-A10).

It was precisely to avoid placing these difficult burdens of proof upon the injured seaman that the entire doctrine of unseaworthiness was created and developed, and we respectfully submit that this Court should review this issue

---

* See Note: *Doctrine of Unseaworthiness in the Lower Federal Courts*, 76 Harv. Law Rev. 819, 824 (1963).

before this substantial exception to the humanitarian doctrine of unseaworthiness is permitted to be carved out by the majority opinion below.

Issue should be settled by this Court

It is axiomatic that use of inadequate equipment such as a defective rope or cable to support a heavy load may constitute unseaworthiness. This doctrine should apply with equal logic and force to the use of inadequate manpower to support a heavy load. In short, whether a rope that is too thin or frayed or a number of men that are too few or weak are employed for a particular lifting operation aboard ship, the liability for unseaworthiness should be identical.

Notwithstanding its apparent common and fundamental nature, the issue of whether unseaworthiness liability may be found for shortage of personnel for a particular task on an otherwise fully manned vessel has never been dealt with directly by this Court, and, except for the instant case, has been determined directly in only two lower court decisions. *American President Lines, Ltd.* v. *Redfern,* 345 F. 2d 629 (9th Cir. 1965), decided in favor of the seaman, and *The Magdapur,* 3 F. Supp. 971 (S. D. N. Y. 1933) decided in favor of the shipowner.

Redfern has been previously discussed (pages 7-8, *supra*). *The Magdapur* was decided 33 years ago, long before this Court's landmark decisions in *Mahnich, Boudoin, Crumady* and *Mitchell.* See also, the pioneering opinion of Judge Learned Hand in *Keen* v. *Overseas Tankship Corp.,* 194 F. 2d 515 (2d Cir. 1952), which first established the equivalence of failures of ship's gear and ship's personnel in giving rise to liability under the doctrine of unseaworthiness.

However, if the decision below is left unreviewed and standing, it breathes new vitality into the *Magdapur* doc-

trine upon which it specifically relies * (356 F. 2d at 251-2; A9-A10; A14).

Both of these areas and concepts are of substantial importance in the maritime law. Provision of insufficient personnel or assistance to carry, move or lift a heavy object or loan aboard ship often gives rise to injury to lower echelon maritime employees.** As technological advancement improves and refines mechanical equipment, those injuries which do occur are more and more the result of the human misuse of otherwise fit gear.

This case combines and presents these two critical issues, which have given rise to sharp differences in views below and as to which "the lower courts are at odds", and cer-

---

* Even were the restrictive concepts of the *Magdapur-Waldron* doctrine applied only in the Second Circuit (and they have already been repudiated by the Ninth Circuit in *Redfern*) there would be sufficient justification for granting certiorari. "Half of all Federal admiralty and Jones Act claims are begun in Second Circuit trial courts." Note: *En Banc Hearings*, 40 N. Y. U. Law Rev. 563, 588 (May 1965). Even were there an absence of direct conflict with decisions of other courts of appeals, the concentration of such litigation in Second Circuit courts should constitute an independent ground for granting the writ of certiorari.

** Thus, several recent cases in the Southern District of New York have presented this question; i.e. whether an unseaworthiness claim arising out of alleged insufficiency of assistance for the lifting or handling of heavy equipment aboard ship should be submitted to the jury. *Instant case* (Tenney, J.; dismissal granted, April 16, 1964); *Escobar* v. *Alcoa S. S. Lines Co.* (60 Civ. 2396, McGohey, J.; Charge to Jury, January 21, 1965); *Presenski* v. *Moore-McCormack Lines, Inc.* (62 Civ. 3757, Levet, J.; Charge to Jury, May 20, 1965); *Almadovar* v. *Luckenbach S. S. Co. Inc.* (Civ. 133-139, Feinberg, J.; Charge to Jury, October 27, 1961). In the instant case Judge Tenney dismissed the seaman's unseaworthiness claim. In the other three cases, the District Judges submitted the seamen's unseaworthiness claims for jury determination.

tiorari should be granted so that this Court may decide and resolve the issues. *Fitzgerald* v. *U. S. Lines Co.*, 374 U. S. 16, 17 (1963).

Supervisory function of this Court

This Court has emphasized that in seamen's cases the jury "plays a pre-eminent role". *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 523 (1957); *Michalic* v. *Cleveland Tankers Inc.*, 364 U. S. 325, 330-1 (1960). It has repeatedly held that directed verdicts and dismissals of seamen's claims are to be granted only in the rarest circumstances. The policy of the majority of this Court has been to exercise a strong supervisory function to prevent interference with or "erosion" of the role of the jury in the determination of FELA and seamen's cases, and writs of certiorari have been particularly granted "when the statutory or constitutional right to decision by a jury is in issue". *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 509 (1957); Stern and Gressman, *Supreme Court Practice* (3rd Ed., § 4-15, p. 144-5 and authorities there cited.

In the instant case, petitioner presented eye-witness testimony that he was injured while hauling a heavy manila line on the ship's deck, while acting pursuant to orders and in the direct line of the duties of his maritime employment. Petitioner also presented expert testimony by a ship's master of 50 years' maritime experience that the performance of this task by only two men involved a shortage of personnel and an unsafe method of operation.

The court below dismissed this claim as a matter of law and took away its determination from the jury which had heard the evidence. This was an extreme "departure by a lower court" from the principles of law controlling the petitioner's right to a jury trial and "call for an exercise of this court's power of supervision". Rule 19(1)(b), Supreme Court Rules.

CONCLUSION

Several substantial grounds for granting a writ of certiorari have been established. They are:

1. Conflict with the decisions of other courts of appeals on the same matters;

2. Conflict on a Federal question with applicable decisions of this Court;

3. Presentation of important questions of federal law which have not but should be settled by this Court; and

4. Deprivation of petitioner's right to a jury trial so as to call for an exercise of this Court's power of supervision.

We respectfully submit that this case presents several of the most important and unsettled aspects of maritime law which are repeatedly presented to the lower Federal courts, as to which the lower courts are at odds and which require resolution by this Honorable Court.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

THEODORE H. FRIEDMAN,
Attorney for Petitioner,
1501 Broadway,
New York 36, N. Y.

THEODORE H. FRIEDMAN,
HENRY ISAACSON,
EVE M. PREMINGER,
Of Counsel.

(APPENDIX)

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 93—September Term, 1965.

(Argued October 27, 1965 Decided January 31, 1966.)

Docket No. 29504

JAMES J. WALDRON,

Plaintiff-Appellant,

against

MOORE-McCORMACK LINES, INC.,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge*,
MEDINA and SMITH, *Circuit Judges*.

Appeal from a judgment and an order of the United States District Court for the Southern District of New York, Charles H. Tenney, Judge.

Plaintiff, a seaman, appeals from a judgment for defendant shipowner in a personal injury case in which, at the close of all the evidence, one of plaintiff's unseaworthiness claims was dismissed, and from an order denying plaintiff's motion for a new trial. Opinion below not reported. Affirmed.

THEODORE H. FRIEDMAN, New York, N. Y. (Henry Isaacson, and Phillips, Nizer, Benjamin, Krim & Ballon, New York, N. Y., on the brief), for plaintiff-appellant.

WILLIAM M. KIMBALL, New York, N. Y. (Burlingham Underwood Barron Wright & White, New York, N. Y., on the brief) for defendant-appellee.

MEDINA, *Circuit Judge*:

James J. Waldron, an able seaman and a member of the crew of the SS Mormacwind, fell and injured his back as he and another member of the crew were hauling a heavy manila mooring line along the deck of the vessel during a docking operation. The issue of negligence and several features of the issue of unseaworthiness, as claimed by Waldron, were submitted to the jury who returned a verdict for defendant. One of the unseaworthiness claims against the shipowner having been dismissed and the motion for a new trial denied, the seaman appeals. The sole question before us on this appeal is whether the trial judge committed error when he refused to permit the jury to pass upon Waldron's additional claim of unseaworthiness based upon an order of the third mate that 2 men were to carry the line from where it was coiled on a grating on the deck to a mooring chock approximately 56 feet away. There was expert evidence to the effect that 3 or 4 men rather than 2 were required to carry the line in order to constitute "safe and prudent seamanship." It is not disputed that the vessel was properly and fully manned and that the crew including the officer who gave the order were in all respects competent to perform their duties.

The findings implict in the verdict are: (1) that the order given by the third mate was not a negligent order, that is to say, plaintiff failed to convince the jury that under the circumstances a reasonably prudent man would not have given such an order; and (2) that the vessel was not unseaworthy because the deck was tacky from wet paint or was wet and slippery. No shore workers are involved nor is there any claim of a defect in the vessel or any of its gear, equipment and appliances.

I.

According to the log, the docking operation of SS Mormacwind at her Brooklyn pier was consummated in 11 minutes, between 1:20 and 1:31 P.M. on May 8, 1960. Coast Guard regulations required the vessel to carry on deck, in the unlicensed category, 6 able seamen and 3 ordinary seamen. In fact, she carried a boatswain and two deck utility men in addition. Thus the SS Mormacwind had three more unlicensed deck crewmen than her certificate required and all of them were on board during the docking operation.

Waldron was working in the aft docking gang on the starboard side of the ship, inboard, under the command of Tarantino, the third mate. The usual complement of this gang was 3 able seamen and 2 ordinary seamen. On this particular occasion, Tarantino had under his orders 4 able seamen, including Waldron, and 1 ordinary seaman.

As the operation progressed with the requisite dispatch, the officer on the bridge decided another mooring line was necessary as a spring line and the order was passed on to Tarantino. As all the other men were occupied with urgent tasks connected with the other lines, Tarantino assigned to Waldron and another able seaman, who was exceptionally strong and capable, the task of putting out this new line "as quickly as possible." The other seaman took the eye of the line, threw about 15 feet of slack "over one

shoulder and over the other," and had reached the chock. Waldron was tugging at the top of the coil, attempting to flake some slack along the deck, when he slipped and fell.

Waldron's position on the particular phase of the claim of unseaworthiness that Judge Tenney refused to submit to the jury was very clear to the effect that "[i]t is a question of how many men were assigned to this particular job." It made no difference how well the vessel was manned. Nor was it of consequence that an adequate number of competent seamen were assigned to the group handling the lines aft under the direction of the third mate. "There could have been a hundred men on the stern, or five." Similarly, he contended that other factors, such as the urgency of getting out the new line, the tasks being performed by the other men, the condition of the current, wind and so on, were absolutely irrelevant to the issue of unseaworthiness, even though they did have a bearing on the issue of negligence.

We agree with Judge Tenney, whose short memorandum opinion is not reported, and we affirm.

II.

The doctrine of unseaworthiness has had a long history. The so-called warranty of seaworthiness in early American law has its roots in contracts of marine insurance and affreightment, under which liability was conditioned on the vessel being "sufficient in all respects for the voyage; well-manned, and furnished with sails and all necessary furniture." 1 Conkling, Admiralty Jurisdiction, 164-5 (1848). A similar requirement, stemming from the ancient codes, was implied in contracts for the carriage of goods and passengers by sea. Abbott, Merchant Ships and Seamen, 178-9 (1802); see *The Caledonia*, 1895, 157 U. S. 124. This duty to provide a seaworthy vessel was absolute, see *Work* v. *Leathers*, 1878, 97 U. S. 379-80; Abbott, Merchant Ships

and Seamen, *supra,* at 178, 181; and, even in its early foundations, seaworthiness was a threefold concept: the vessel must be "tight and staunch," her gear, equipment and appliances must be serviceable and in good order, and the crew, including the master and his subordinates, must be competent and sufficient in number to man the ship. 1 Parsons, Maritime Law 122 (1859); Desty, Manual of the Law Relating to Shipping and Admiralty, Section 232 (1879); *Lord* v. *Goodall S.S. Co.,* C. C. D. Cal., 1877, 15 Fed. Cas. 884, 887-88 (No. 8,506), aff'd on other grounds, 1880, 102 U. S. 541; *In re Meyer,* N. D. Cal., 1896, 74 Fed. 881, 885; *The Gentleman,* S. D. N. Y., 1845, 10 Fed. Cas. 190, 192 (No. 5,324), rev'd on other grounds, C. C. S. D. N. Y., 10 Fed. Cas. 188 (No. 5,323); *Tait* v. *Levi,* [K. B. 1811] 14 East 481.

For a variety of reasons, historical, ethical, sociological and others, we should not be surprised to find that the interests of cargo owners and passengers were paramount in the early days just referred to. Humanitarian considerations were not in vogue. Although the unseaworthiness of a vessel gave a seaman the right to abandon ship without penalty and to be paid his wages, see *Dixon* v. *The Cyrus,* D. Pa., 1789, 7 Fed. Cas. 755 (No. 3,930); *Rice* v. *The Polly and Kitty,* D. Pa., 1789, 20 Fed. Cas. 666 (No. 11,754), and mariners were entitled to maintenance and cure for injuries suffered in the service of the ship, see *Harden* v. *Gordon,* C. C. D. Me., 1823, 11 Fed. Cas. 480 (No. 6,047), the early maritime law afforded no remedy by way of compensatory damages for personal injuries. See Lucas, Flood Tide: Some Irrelevant History of the Admiralty, 1964 Supreme Court Review 249, 299; Smith, Liability in the Admiralty for Injuries to Seamen, 19 Harv. L. Rev. 418, 431 (1906).

From 1903 and the much discussed dictum of *The Osceola,* 189 U. S. 158, through the Jones Act in 1920, 41 Stat. 1007, 46 U. S. C., Section 688, the long series of longshoreman cases, down to *Mitchell* v. *Trawler Racer, Inc.,*

1960, 362 U. S. 539, and beyond, there has developed a vast body of federal law concerning the right of a seaman, or a person performing the traditional duties of a seaman, to recover compensatory damages for injuries caused by the unseaworthiness of the vessel. It no longer matters in these personal injury cases whether the unseaworthy condition was caused by the negligence of the shipowner or anyone else. The rule that the so-called warranty applies only to the vessel as she left her home port at the commencement of the voyage, which posed the problem we found so vexing in *Dixon* v. *United States*, 2 Cir., 1955, 219 F. 2d 10, has, at least in some respects, been blown away by the winds of time. But the basic threefold concept of a sound ship, proper gear and a competent crew has remained unchanged. Each of these contributes in a special way to provide "a vessel reasonably suitable for her intended service." *Mitchell* v. *Trawler Racer, Inc.*, 1960, 362 U. S. 539, 550, *supra*. It may therefore be profitable briefly to examine the developments in the maritime law applicable to each of these three separate but complementary phases of the warranty of seaworthiness.

Little need be said concerning the requirement of a ship "tight and staunch," as the 1936 Carriage of Goods by Sea Act, 46 U. S. C., Sections 1300 ff., has cut down the shipowner's duty to the exercise of due care only with respect to cargo owners. We have found nothing to indicate that the duty to furnish a sound ship is less than absolute vis-á-vis members of the crew. Pertinent illustrations are cracked plates, *McGee* v. *United States*, 2 Cir., 1947, 165 F. 2d 287, the falling of a rotted signal mast, *Nagle* v. *United States*, S. D. N. Y., 1953 A. M. C. 2109, blobs of grease or spots of oil on the deck or on ladders, *Yanow* v. *Weyerhaeuser S.S. Co.*, 9 Cir., 1957, 250 F. 2d 74, cert. denied, 1958, 356 U. S. 937; *Calderola* v. *Cunard S.S. Co.*, 2 Cir., 1960, 279 F. 2d 475, cert. denied, 364 U. S. 884. Often, and probably

generally, the question is one of fact for the judge or jury as in *Mitchell* v. *Trawler Racer, Inc.*, 1960, 362 U. S. 539, *supra*, where there was fish gurry on the ship's rail. See also *Blier* v. *United States Lines Co.*, 2 Cir., 1961, 286 F. 2d 920, cert. denied, 368 U. S. 836. But there must always be proof on the basis of which a finding of unseaworthiness can be made.

It is with respect to the ship's gear, equipment and appliances that the most significant developments along liberal lines have taken place. It now makes no difference that other safe gear was available but not used. See, e.g., *Mahnich* v. *Southern S.S. Co.*, 1944, 321 U. S. 96. Shore workers, including longshoremen and others performing tasks traditionally the work of seamen, became entitled to the benefits of the warranty of seaworthiness. *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U. S. 85. And the doctrine has been applied to them even if the defective gear was supplied by the stevedore who brought it aboard ship. See, e.g., *Alaska S.S. Co.* v. *Petterson*, 1954, 347 U. S. 396, affirming 205 F. 2d 478 (9 Cir., 1953). Even if the gear or appliances were not defective, a maladjustment might make them dangerous and the vessel could be found unseaworthy. *Crumady* v. *The Joachim Hendrick Fisser*, 1959, 358 U. S. 423. So also with a stuck valve that could only be "broken" by the use of tools or several men working together. *American President Lines, Ltd.* v. *Redfern*, 9 Cir., 1965, 345 F. 2d 629. So also with a portable aluminum ladder leading to the hold which slipped out of place and fell due to the movement of the ship, despite the fact that an officer had placed a man to hold it and had told him to keep watch over it. *Reid* v. *Quebec Paper Sales & Transp. Co.*, 2 Cir., 1965, 340 F. 2d 34. Other instances of dangerous conditions

caused by defects in, or analogous improper use of, various types of gear and equipment could be multiplied.[1]

Many of the cases above referred to, and others, have been cited in appellant's brief. We are urged to take the position in this case that the principles of these gear and equipment cases are applicable here on the theory that any condition aboard ship that is of potential danger to the members of the crew is necessarily a condition of unseaworthiness, irrespective of how it came into existence and, of course, irrespective of any negligence or fault on the part of the shipowner or his agents or the officers or other members of the crew.

The reason we cannot do this is inherent in the traditional triple concept of unseaworthiness. With respect to the crew, including the officers, all that is or has been required is that the vessel be properly manned. That is to say, in order to be "reasonably suitable for her intended service" the vessel must be manned by an adequate and proper number of men who know their business. There is no requirement that no one shall ever make a mistake. If someone is injured solely by reason of an act or omission on the part of any member of a crew found to be possessed of the competence of men of his calling, there can be no recovery unless the act or omission is proved to be negligent. We have found no authority to the contrary. Indeed,

---

[1] *Grillea* v. *United States*, 2 Cir., 1956, 232 F. 2d 919, 922, refers to the question "whether a *defect in hull or gear* that arises as a momentary step or phase in the progress of work on board should be considered as an incident in a continuous course of operation" (emphasis supplied). See also *Ferrante* v. *Swedish American Lines*, 3 Cir., 1964, 331 F. 2d 571, petition for cert. dismissed, 379 U. S. 801; *Thompson* v. *Calmar S.S. Corp.*, 3 Cir., 1964, 331 F. 2d 657, cert. denied, 379 U. S. 913.

In *DeLima* v. *Trinidad Corporation*, 2 Cir., 1962, 302 F. 2d 585, there was not only a quantity of oil on the deck of the engine room but the vessel was not properly manned, as 2 of the 3 wipers had left the ship earlier in the voyage and had not been replaced.

this rule seems to us to be based not only on a uniform course of judicial opinion but also on sound reason. In the management of the vessel both at sea and in port, moments of lesser or greater urgency are bound to occur when quick decisions have to be made, and there is always the possibility of what may appear by way of hindsight to be errors of judgment. To alter the rule, in the absence of legislation, would, we think, come close to requiring the shipowner to provide "an accident proof" ship, which the teaching of Mr. Justice Stewart's landmark and highly clarifying opinion in *Mitchell Trawler Racer, Inc.*, 1960, 362 U. S. 539, 550, *supra*, specifically negates.

III.

In any event, the uniform current of authority in this Circuit supports the view and we hold that, if the shipowner has furnished a well-manned ship, with a competent crew, there can be no liability for personal injuries caused by an order of an officer of the ship that is not proved to be such as would not have been made by a reasonably prudent man under the circumstances.

In *The Magdapur*, S. D. N. Y., 1933, F. Supp. 971, Judge Patterson decided the precise question here involved and held that the vessel was not shown to be unseaworthy. The only difference is that 3 men were ordered to move a heavy mooring wire and there was evidence that 6 or 7 men were necessary. The ground of decision was that the warranty of seaworthiness required only an adequate number of competent men in the crew and it was not shown that any of the men on hand and available lacked the skill and ability of men of their calling. "The error was that of the chief officer in assigning to the particular task too few of the men available for work." 3 F. Supp. at 972.

Judge Patterson's ruling in *The Magdapur* was cited with approval by Judge Learned Hand in 1952 in *Keen* v. *Overseas Tankship Corp.*, 2 Cir., 194 F. 2d 515, cert. de-

nied, 343 U. S. 966, in the course of his discussion of the point that, if a member of the crew was incompetent, it was not necessary to prove that the shipowner knew or had reason to believe he was incompetent.

Two later cases in this Circuit also follow the principle that there must be proof of incompetence on the part of an officer of the vessel to warrant a finding of unseaworthiness based upon "allegedly imprudent action by a seaman's superior." *Ezekiel* v. *Volusia S.S. Co.*, 2 Cir., 1961, 297 F. 2d 215, 217, cert. denied, 1962, 369 U. S. 843; *Pinto* v. *States Marine Corp.*, 2 Cir., 1961, 296 F. 2d 1, cert. denied, 1962, 369 U. S. 843. We adhere to these rulings.

Affirmed.

SMITH, *Circuit Judge* (dissenting):

I dissent.

The central proposition of the Court's opinion is the rule stated in *Pinto* v. *States Marine Corp. of Delaware*, 296 F. 2d 1 (2 Cir. 1961), cert. den. 369 U. S. 843 and in *Ezekiel* v. *Volusia S.S. Co.*, 297 F. 2d 215 (2 Cir. 1961), cert. den. 369 U. S. 843, that the doctrine unseaworthiness does not extend to an injury caused by "an order improvidently given by a concededly competent officer on a ship admitted to be in all respects seaworthy," Gilmore & Black, The Law of Admiralty (1957), 320. Gilmore and Black call such a case "an almost theoretical construct." For two reasons I do not believe this proposition even if it still has vitality should control this case.

First, the proposition evidently refers to cases where there is alleged to be a negligent creation of unseaworthiness. Gilmore & Black cited *Chelentis* v. *Luckenbach S.S. Co.*, 247 U. S. 372 (1918), *McMahon* v. *The Panamolga*, 127 F. Supp. 659 (D. Md. 1955), and *Imperial Oil, Ltd.* v. *Drlik*, 234 F. 2d 4 (6 Cir. 1956), all dealing either with negligence or the negligent creation of unseaworthiness.

In this case, however, appellant's claim for unseaworthiness which was dismissed did not depend on negligence; it survives the verdict making it implicit that there was no negligent order given.

Second, appellant does not admit that the ship was "in all respects seaworthy." His case is that the ship was unseaworthy because of the manner in which the rope was used. Whether an appliance or item of gear is serviceable and in good order cannot be determined abstractly. It depends on whether the gear is reasonably fit for its intended use. Inquiry into this involves determining both the purpose for which the gear is used, and the manner in which it is used. This is precisely what occurred in *American President Lines, Ltd.* v. *Redfern*, 345 F. 2d 629 (9 Cir. 1965), *Ferrante* v. *Swedish American Lines*, 331 F. 2d 571 (3 Cir. 1964), and *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423 (1959). In each of these cases there was unseaworthiness because gear was employed in a manner which turned out to be improper. In *Ferrante* it was "undisputed that the ship's equipment—the manilla ropes—was fit for its intended use." Yet it was used in an abnormal manner, and injury resulted. And in *Redfern*, the court said, "a stuck sea valve . . . is suitable only if operated by two men; otherwise it constitutes a dangerous condition," and held that the vessel was unseaworthy. In *Crumady*, unseaworthiness resulted when a circuit breaker safety device in a winch was set for a stress greater than the same working load on the unloading gear.

I see no meaningful difference between rendering safe equipment defective and unsafe, which is *Crumady*, see also *International Nav. Co.* v. *Farr & Bailey Mfg. Co.*, 181 U. S. 218 (1901), and using equipment in a manner which makes it unsafe, which is *Ferrante*, *Redfern*, and this case.

The fact that the unsafe method arose out of an order does not excuse the ship. An order usually lurks in the

background of the act of a seaman in the performance of his duties.

Nor is the fact that the crew was as a whole complete a bar to recovery. In the first place appellant alleges that it was the method of employing gear which made the vessel unseaworthy, not crew size or competence. Secondly, the argument that the crew as a whole was adequate is merely stating in another form the defense rejected in *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96 (1944), that the vessel had available safe equipment which was not used. The unseaworthiness issue in *The Magdapur*, 3 F. Supp. 971 (S. D. N. Y. 1933), was decided solely on the theory that the vessel as a whole was adequately manned. This rationale cannot stand in the face of the development of the doctrine in the intervening years, illustrated by the holding in *Mahnich*.

I would reverse for new trial on the unseaworthiness issue.

Opinion of District Court

Plaintiff moves herein for a new trial on the grounds of three alleged errors arising during the course of the trial.

As to points 1 and 3, the motion is denied.

Point 2 asserts that the Court erred in failing to submit to the jury plaintiff's claim of unseaworthiness based on the alleged failure to provide sufficient manpower for the task of hauling and putting rope through the forward chock on the starboard aftpart of the defendant's vessel's main deck.

The following were the uncontroverted facts submitted to the Court and jury:

According to the Coast Guard certificate, the vessel was only required to carry on deck in the unlicensed department six able and three ordinary seamen; and in addition to the six able and three ordinary seamen she had a boatswain and two deck utility men. Her articles thus showed that she had three more unlicensed deck crewmen than her certificate required. At the time of the alleged accident, the vessel had on board every one of the deck crew shown on the articles.

The evidence further showed that, the vessel docking between 12 Noon and 4 P.M., there would in the ordinary course be one able seaman from the aft docking station at the wheel, acting as quartermaster; thus the full complement on the aft docking station during those hours would consist of five unlicensed members of the deck department under the command of the third officer, the five normally being three able and two ordinary seamen. At the time of the alleged accident and for a time prior thereto, there were five unlicensed men at the aft docking station, consisting of four able-bodied seamen and one ordinary seaman; thus the place of one ordinary seaman had been taken by an able-bodied seaman.

The alleged unseaworthiness consisted of the apportionment of the five men to do the various operation in that sector. Plaintiff claims that the condition which resulted from the third mate's apportioning of the men, i.e., two men assigned to do the work of three (plaintiff's expert testified that it was his opinion that the work ordered done was a three-four man job), regardless of whether the order was improvident or not, constituted unseaworthiness.

The Court, on the basis of the facts presented and the law, directed a verdict for the defendant on that claim. The Court's decision was based on a decision by Judge Patterson, in *The Magdapur*, 3 F. Supp. 971, 972-73 (S. D. N. Y. 1933), and certain language contained in *Pinto* v. *States Marine Corp.*, 296 F. 2d 1, 3 (2d Cir. 1961), cert. denied, 369 U. S. 843 (1962) and *Ezekiel* v. *Volusia S. S. Co.*, 297 F. 2d 215, 217 (2d Cir. 1961), cert. denied, 369 U. S. 843 (1962).

On reconsideration, I find these authorities both persuasive and controlling. Accordingly, plaintiff's contention as to point 2 is rejected, and plaintiff's motion is in all respects denied.

So ordered.

Dated: New York, New York,
November 9, 1964.

CHARLES H. TENNEY,
U. S. D. J.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of January one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. HAROLD R. MEDINA,
HON. J. JOSEPH SMITH,
Circuit Judges.

JAMES J. WALDRON,
Plaintiff-Appellant,

v.

MOORE-MCCORMACK LINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York,

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment and order of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 233

JAMES J. WALDRON,

Petitioner,

—against—

MOORE-McCORMACK LINES, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM M. KIMBALL
Counsel for Respondent
25 Broadway
New York, New York 10004

BLANK

PAGE

In the

Supreme Court of the United States

October Term, 1966

No. 233

James J. Waldron,

Petitioner,

—against—

Moore-McCormack Lines, Inc.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petition adequately sets forth the citation of the Court of Appeals' opinion, the fact that the District Court's opinion is unreported, and the jurisdictional requisites.

Question Presented

With "no authority to the contrary" (A8), should the Court review the Second Circuit's affirmance, based upon "a uniform course of judicial opinion" and "sound reason" (A9), that vacuous opinion testimony was insufficient to permit a finding that the otherwise seaworthy vessel became less than reasonably fit to dock solely by virtue of a non-negligent order that 2 men put out another mooring line?

Statement

The relevant facts, set forth in the Court of Appeals' opinion (A2-4), are that while the 11 minute docking operation of the fully, properly, competently manned ship was proceeding with requisite dispatch and while all other members of the docking gang were urgently busy with other mooring lines, plaintiff fell while he and another exceptionally strong, capable seaman were putting out another line ordered by the third mate. The general verdict for defendant implicitly rejected plaintiff's claims that the 2 man order was negligent and that the deck was unseaworthy. Plaintiff did not contend that any of the vessel's equipment was deficient. The Court of Appeals affirmed dismissal of plaintiff's claim, based solely upon an *in vacuo* opinion,[1] that use of the 2 available seamen to put out the additional line caused the ship to become unseaworthy.

---

[1] The petition exceeds the record by inferring nonexistent testimony that, under the prevailing circumstances, use of 2 men was "an unsafe operation", "an unsafe method", "a dangerous condition" arising from "nonuse or misuse of ship's personnel", "insufficient manpower", "shortage of personnel". The Court of Appeals emphasized by quotation (A2) that the only evidence concerning the propriety of using 2 men was an opinion that "safe and prudent seamanship would call for" (26a) "three or four men" (83a). The Court also emphasized (A4) that this opinion was elicited, over objection (27-28a), by a hypothetical question which expressly excluded (45-46a) "twenty-five common factors which the person in charge of this operation would necessarily have to take into consideration in order to safely dock the ship" (44a) and which "would have a bearing upon whether what the mate did was safe, prudent and seamanlike" (45a).

Argument

Finding "no authority to the contrary" (A8), the Court of Appeals expressed belief that its decision is "based not only on a uniform course of judicial opinion but also on sound reason" (A9). Although the petition initially suggests that the decision conflicts with some by this Court and other courts of appeal, it eventually concedes (Pet. 15) that the question sought to be raised "has never been dealt with directly by this Court" and "has been determined directly" by only one other assertedly conflicting appellate decision, *American President Lines* v. *Redfern*, 345 F. 2d 629 (9 Cir. 1965). As stated below, *Redfern* involved "a stuck valve that could only be 'broken' by the use of tools or several men" (A7), neither of which were furnished. *Redfern*, dealing with basically unseaworthy equipment which could only be made reasonably fit by unprovided tools or manpower, obviously does not conflict with the decision below and is not even apposite. This is further clarified by the unreported memorandum opinion of the California District Court which, without mentioning any lack of tools or manpower, simply held "that the vessel is unseaworthy in that the low sea suction valve on the port side was stuck or frozen, constituting an unseaworthy condition of the ship's equipment".

The notion that oblique decisional conflicts exist is dispelled by the opinions upon which petitioner relies.[2] Unlike

---

[2] Petitioner cites *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96 (1944); *Crumady* v. *The J. H. Fisser*, 358 U. S. 423 (1959); *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U. S. 336 (1955); *Ferrante* v. *Swedish American Lines*, 331 F. 2d 571 (3 Cir. 1964), dismissed 379 U. S. 801; *Thompson* v. *Calmar Steamship Corp.*, 331 F. 2d 657 (3 Cir. 1964), cert. denied 379 U. S. 913; *Hroncich* v. *Ameri-*

Mahnich, there was no use of defective gear instead of available safe gear. Even if, contrary to "the traditional triple concept of unseaworthiness" (A8), the doctrine precluded any possible distinction between gear and men, the record establishes that "all the other men were occupied with urgent tasks connected with the other lines" (A3) and hence there was no failure to use available manpower. *Crumady* is factually the reverse of *Redfern* in that, as the Court of Appeals recognized (A7), *Crumady* involved basically sound equipment made unseaworthy by maladjustment. *Boudoin* dealt with a seaman so vicious as to be incompetent. Here, it is not disputed "that the crew including the officer who gave the order were in all respects competent to perform their duties" (A2). *Ferrante,* alternatively decided on negligence grounds, involved improper use of gear so as to create an unseaworthy cargo draft and *Thompson,* also decided on alternative negligence grounds, involved improper use of makeshift equipment which created an unseaworthy condition. *Hroncich* and *Scott* are unseaworthy stowage cases and *Blassingill* is another unseaworthy cargo draft case.

None of these opinions definitively answers petitioner's abstract question of whether an assumed "improper work method"[2] constitutes unseaworthiness, although some of the cases do hold that an improper method may create a *condition* which *condition* is unseaworthy. Presumably that

---

can President Lines, 334 F. 2d 282 (3 Cir. 1964); *Scott* v. *Isbrandtsen Co.,* 327 F. 2d 113 (4 Cir. 1964); and *Blassingill* v. *Waterman Steamship Corp.,* 336 F. 2d 367 (9 Cir. 1964).

[2] As stated in the first footnote, the record is devoid of any testimony that, under the prevailing circumstances, the mate's order was improper or created an improper condition.

is the intended meaning of the dictum in *Morales* v. *City of Galveston*, 370 U. S. 165, 170 (1962), emphasized in the petition (Pet. 8).

As the Court of Appeals pointed out (A9), petitioner's claim ignores the clarifying opinion in *Mitchell* v. *Trawler Racer*, 362 U. S. 539 (1960), that a seaworthy vessel need not be so "accident proof" as to be potentially capable of withstanding every exigency; the "standard is not perfection but reasonable fitness", 362 U. S., p. 550, "a relative concept dependent in each instance upon the circumstances in which its fitness is drawn into question", *Lester* v. *United States*, 234 F. 2d 625, 628 (2 Cir. 1956), dismissed 352 U. S. 983. Thus, seaworthiness cannot possibly be put in issue by the *in vacuo* opinion testimony upon which petitioner wholly relies.

The peculiar record is too feeble to squarely raise any important, recurrent question for determination by this Court and petitioner's assertion that the case requires the Court's supervisory intervention is too insubstantial to bear comment.

Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

WILLIAM M. KIMBALL
Counsel for Respondent

IN THE

Supreme Court of the United States

October Term, 1966

No. 233

JAMES J. WALDRON,

Petitioner,

against

MOORE-McCORMACK LINES, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

THEODORE H. FRIEDMAN,
Attorney for Petitioner,
Office & P. O. Address,
1501 Broadway,
New York, N. Y. 10036.

BLANK

PAGE

IN THE

Supreme Court of the United States

October Term, 1966

No. 233

JAMES J. WALDRON,

Petitioner,

against

MOORE-McCORMACK LINES, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

Respondent desperately attempts to avoid the serious question which persuaded this Court to grant certiorari—and the lower courts and commentators to grant extensive consideration to this case *—by misconstruing the testimony. Respondent's brief (p. 6) incorrectly asserts that petitioner's maritime expert, Capt. Darrigan, merely stated that the rope should have been flaked out on the deck and that he did not testify that the use of only two men for the hauling and carrying operation here involved was unsafe because the task was a job for three or four men.

---

* The District Court ruled both ways on the question (compare R 29, see also, R 32-R 33 with R 60-R 62) and took almost six months to decide the post-trial motion (R 57, R 62). An extensive opinion was written by the Court of Appeals (R 63-R 72) and the case drew immediate law review comment. *Admiralty: Inadequate Manpower and the Unseaworthiness Doctrine*, 66 Columbia Law Review 1180 (1966).

The District Court judge specifically stated:

> "plaintiff's expert testified that it was his opinion that the work ordered done was a three-four man job." (R 61)

The prevailing opinion in the Court of Appeals reviewed the record as follows:

> "There was expert evidence to the effect that 3 or 4 men rather than 2 were required to carry the line in order to constitute 'safe and prudent seamanship'." (R 63)

Petitioner's main brief contains five different quotations from Capt. Darrigan's testimony to that effect (Pet'rs. Br. pp. 3-4; citing R33, 34, 38, 42 and 53).

Respondent's attempt to avoid the important legal issue here presented and its attempt to besmirch the integrity of the maritime expert's testimony (Resp'ts Br. p. 11)—clearly a matter for jury resolution—exposes the absence of support for its legal position.

The basic legal question remains—does the fact that respondent's vessel contained a sufficient number of men *overall* exonerate it, as a matter of law, from unseaworthiness liability for a shortage of personnel for the particular job function at the time and place the task was performed?

This Court has expressly rejected the defense that overall adequacy or sufficiency of equipment aboard ship exonerates the ship owner from liability caused by failures in the particular equipment actually provided for the job function at the time and place of performance. *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96 (1944). Respondent has totally failed to meet that authority or to establish any basis for the inapplicability of the beneficial and persuasive *Mahnich* doctrine to a situation involving insufficiency of personnel for the job function at hand.

Respondent's reliance on the Coast Guard Manning Regulations (46 U.S.C. § 222; 46 C.F.R. §§ 157.01-1 et seq.) is misplaced. These merely set forth minimum requirements for the overall ship. In no way do the Coast Guard Regulations seek to define the number of men regarded as sufficient for any one of the myriad particular tasks that arise during the daily operation of a vessel. They do not attempt to establish standards of seaworthiness or of sufficient manning for particular tasks or circumstances, as is obvious from a study of the Regulations themselves. See particularly, 46 C.F.R. §§ 157.15-1, 157.20-15(b). Whether a sufficient number of men have been provided for a specific job function must be determined upon the circumstances of each particular case.

It is a not infrequent occurrence that, notwithstanding compliance with the overall complement requirement of the Coast Guard, a ship is short-handed for a particular task or job function. Thus, in *DeLima* v. *Trinidad Corp.*, 302 F. 2d 585 (2d Cir. 1962), although the vessel lost two wipers during the course of a long Pacific Ocean voyage, its crew complement still met the minimum Coast Guard manning scale. Nevertheless, when a crewman was injured on an oil spill, the Court specifically held that the alleged insufficiency of wipers assigned to the particular function of cleaning the engine room would establish unseaworthiness liability, even in the total absence of negligence (302 F. 2d at 587).

Any failure to meet the Coast Guard overall manning regulations does establish a presumption of fault in favor of the injured party. *The Denali*, 112 F. 2d 952 (9th Cir. 1940), cert. den. 311 U.S. 687. However, the converse does not apply, and the mere fact that the ship does have an overall complement of men aboard sufficient to meet the Coast Guard Regulations does not ipso facto establish seaworthiness or sufficient manning if a specific defect can be shown. See, *Texas Co.* v. *N.L.R.B.*, 120 F. 2d 186,

189-190 (9th Cir. 1941).* It is, of course, settled law that a defendant's compliance with a statutory or administrative standard does not prevent a finding by a jury or trier of facts that more was required in the particular circumstances at hand. See, *Restatement 2d, Torts*, § 288C (1965 ed.).

Respondent is in plain error when it suggests (Resp'ts Br., p. 8) that the use of a hammer to paint the deck could not give rise to unseaworthiness and that a vessel may not be held unseaworthy when an otherwise seaworthy piece of equipment is used improperly or for an unintended purpose. Numerous authorities contradict respondent's position.

In *Crumady* v. *The Joachim Hendrick Fisser*, 358 U.S. 423, 425, 427-8 (1959) a seaworthy winch was adjusted to a 6-ton instead of a 3-ton limit by working longshoremen, and unseaworthiness liability was attached there by this Court. In *Street* v. *Isthmian Lines, Inc.*, 313 F. 2d 35, 36 (2d Cir. 1963) cert. den. 375 U.S. 819, a seaman used a cold chisel instead of a hacksaw for a particular task, although a hacksaw was aboard ship in the tool shop. Unseaworthiness liability was found precisely because an otherwise seaworthy piece of equipment was attempted to be used in an improper manner and for an unintended purpose, with resultant injury, and the existance of the intended and proper tool elsewhere aboard ship was held no defense. In *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523-4 (1957) a ship's baker used a butcher knife instead of a scoop to remove ice cream and a jury verdict in his favor was upheld.** The additional ground

---

* Reliance upon an overall Coast Guard certificate as an exoneration from liability arising out of a particular shipboard situation was also specifically rejected in *Murphy* v. *Overlakes Freight Corp.*, 177 F. 2d 342, 344 (2d Cir. 1949), cert. den. 339 U.S. 913 (1950).

** Although *Ferguson* was a Jones Act-negligence case, its rationale is clearly applicable to unseaworthiness claims, as was specifically held in *Street* (313 F. 2d at 38, fn. 3).

set forth by Judge Smith dissenting below—that the manner of handling of the manila line here involved was improper and gave rise to an unseaworthy condition (R71-R72)—has in no way been met by respondent's brief, although it is supported by the substantial authority above cited and cited in petitioner's main brief.

Respondent's shallow attempt to turn this case into a dispute over the efficacy of expert testimony and jury evaluation of disputed claims (Resp'ts Br., p. 11) is misplaced and is merely an attempt to divert. The basic propositions of maritime law here involved have been discussed fully in petitioner's main brief, and the hard fact is that respondent has been totally unable to meet that discussion and the many authorities there cited.

The judicial dismissal below of petitioner's claim should be reversed and the action remanded to the District Court for a new trial.

Respectfully submitted,

THEODORE H. FRIEDMAN,
Attorney for Petitioner.

THEODORE H. FRIEDMAN,
HENRY ISAACSON,
EVE M. PREMINGER,
of Counsel.

IN THE

Supreme Court of the United States

October Term, 1966

No. 233

JAMES J. WALDRON,

Petitioner,

against

MOORE-McCORMACK LINES, INC.,

Respondent.

BRIEF FOR PETITIONER

THEODORE H. FRIEDMAN,
Attorney for Petitioner,
Office & P. O. Address,
1501 Broadway,
New York, N. Y. 10036.

INDEX

Table of Cases Cited

Other Authorities Cited

BLANK

PAGE

IN THE

Supreme Court of the United States

October Term, 1966

No. 233

JAMES J. WALDRON,

Petitioner,

against

MOORE-McCORMACK LINES, INC.,

Respondent.

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported at 356 F. 2d 247, and is reprinted in the printed Transcript of Record (R62-R72)*.

The opinion of the District Court for the Southern District of New York (Charles H. Tenney, U. S. D. J.) is not reported and is reprinted in the Record (R60-R62).

Jurisdiction

The judgment of the Court of Appeals was entered on January 31, 1966 (R73). Extension of time to file a petition for rehearing and rehearing en banc was granted on

* Page numbers beginning with "R" refer to the printed Transcript of Record.

February 7, 1966 (R73). Such petitions were timely filed and were denied, without opinion, on March 17, 1966 (R74).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

Is a ship rendered unseaworthy by an officer's failure to provide sufficient manpower for performance of particular task, resulting in the adopting of an unsafe method of using otherwise safe gear?

Does overall sufficiency of manpower aboard ship bar imposition of liability for unseaworthiness for an injury arising out of shortage of personnel in the performance of a particular task?

May the manner of use of otherwise safe equipment give rise to liability for unseaworthiness?

Statement of the Case

On May 8, 1960, respondent's vessel was docking at its Brooklyn pier (R2). Petitioner, an able-bodied seaman, was participating in the docking operation from the stern of the vessel (R3-4).

The usual docking crew at the stern consisted of five unlicensed personnel and the Third Mate (R28, R55, R61). The docking operation commenced at 1:20 P. M. and was over at 1:31 P. M., a total of 11 minutes (R12-13, R47).

During the docking operation an additional line was put out from the vessel to the dock from a chock somewhat farther forward in the stern area than was usually employed. Petitioner and another seaman, Walter Chowaniec,

were directed by the Third Mate, Tarantino, to let out this additional line (R5-R6, R19-R20).

This line was 8-inch manila rope (R7). It was coiled approximately 56 feet from the chock through which it was to be let out (R20, R27).

There was evidence that the steel deck surface between the coiled rope and the forward chock was moist from fog and rain, tacky from wet paint, and of difficult and slippery footing (R3, R13-R16, R21). The work of putting out the lines had to be, and was being, performed "as quickly as possible" (R20, R48).

The 56 feet of line, if dry, weighed 104.72 pounds. If wet, it weighed more, and the evidence suggested that it was wet (R15-R16).

While Chowaniec and the petitioner were hauling this line towards the chock, petitioner fell and injured his back (R10-R11, R21-R22, R23).

Petitioner's maritime expert, Dewey Darrigan, a seaman for fifty years and a licensed captain for twenty-five years (R23-R25), stated that the particular job of carrying this line from where it was coiled to the chock required "three or four men" (R33, R37, R42, R46, R51-R52, R53). In Captain Darrigan's experienced and expert opinion the manila line should not have been used and carried in this manner and the performance of the task by only two men "was an unsafe operation" (R38).

Captain Darrigan testified:

> "I would say to drag a line 60 feet or more would need 3 or 4 men at least of that type and weight. (R33)
>
> • • •
>
> I would figure that that is an 8 inch mooring line and to drag it along the deck or the street, there is a lot of physical strength needed. (R34)
>
> • • •

My opinion is that this was an unsafe operation. (R38)

* * *

Q. . . . do you nevertheless feel that safe and prudent seamanship dictated that 3 or 4 men be assigned to take this line from the place marked with the R to the chock marked with the II? A. I do. (R42)

* * *

Q. What is your opinion as to whether the vessel was sufficiently manned with regard to the aft deck docking gang? A. I said no." (R53)*

Respondent's counsel contended on cross-examination that there were "25 common factors" hypothetically relevant to the docking operation (R45). This, however, was hardly probative in the circumstances of this case.

The docking was at a Brooklyn pier in New York Harbor, at high noon on a May day (R17). According to the log it took only 11 minutes, with no unusual weather, tide or shipping conditions (R47-R48). To a man of Captain Darrigan's experience, there were no special or unusual conditions requiring adjustment of his basic view that the safety of the job required three or four men. On redirect examination, he specifically stated that the hypothetical "25 other factors" in no way changed his opinion that the particular job here involved, under the actual circumstances

---

* Captain Darrigan's expert testimony was probably not even necessary for petitioner's *prima facie* case. A jury could well have found that the safe performance of the urgent hauling of a wet 56-foot manila line of 8" diameter, weighing over 100 pounds, across a misty steel deck and letting it out through a chock required more than two men, particularly in the light of testimony that the custom was to provide at least 3 men for such tasks (R7-R9). *Salem* v. *U. S. Lines Co.*, 370 U. S. 31, 35-7 (1962).

shown by the ship's log, would require three or four men (R46).*

Upon this record and notwithstanding Captain Darrigan's flat assertion that the ship was insufficiently manned at the precise time and place of the accident (R53) and that the work as performed constituted an unsafe operation (R38), before the case was submitted to the jury the trial judge (Tenney, J.) dismissed petitioner's claim of unseaworthiness with respect to the alleged shortage of personnel for the task at hand (R55-R56).**

Respondent had presented proof that the overall number of seamen aboard the vessel met the Coast Guard minimum requirements and that the overall number of men assigned to the docking crew at the stern of the vessel at the time of the accident constituted the usual number of five men and one officer (R54-R55, R61).

Respondent's legal contention was that the other three men were engaged in necessary tasks at the time of the accident, and that its liability, if any, as a matter of law, lay only in negligence with respect to the improvidence, if any, of the Third Mate's order assigning only two men to the task (R28-R30, R32-R33, R54-R56).

---

* Certainly, on respondent's motion to dismiss at the close of all the evidence, petitioner's testimony and that of his expert was entitled to be treated as true and the most favorable inferences granted in evaluating whether the evidence was sufficient to present a jury case. *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 327, 329, 330-1 (1960). Captain Darrigan's opinion, although perhaps not necessary to petitioner's *prima facie* case, was clearly admissible and raised an issue for jury determination. *Eastern Transportation Line* v. *Hope*, 95 U. S. 297 (1877); *Carlson* v. *Chisholm-Moore Hoist Corp.*, 281 F.2d 766, 772 (2d Cir. 1960).

** Judge Tenney had made a contrary ruling earlier in the trial; i.e., that "the failure to supply a sufficient number of men on this particular operation . . . constituted unseaworthiness" (R29, see also R32-R33).

Petitioner's post-trial motion for a new trial (R58-R60) was made on April 27, 1964 (R57) and decided on November 9, 1964 (R60). The District Court adhered to its dismissal on the grounds of *The Magdapur,* 3 F. Supp. 971 (S. D. N. Y. 1933) and "certain language" in the opinions in *Pinto* v. *States Marine Corp. of Delaware,* 296 F. 2d 1, 3 (2d Cir. 1961), pet. for rhg. den., 296 F. 2d 8, cert. den. 369 U. S. 843, 891 and *Ezeki* v. *Volusia Steamship Co.,* 297 F. 2d 215, 217 (2d Cir. 1961), cert. den. 369 U. S. 843 (Opinion of Tenney, J.; R60-R62).

On the appeal to the Court of Appeals, the dismissal was affirmed by a divided panel, Senior Judge Medina writing for himself and Chief Judge Lumbard and Circuit Judge Smith dissenting (356 F. 2d 247; R62-R72).

Judge Medina's opinion extensively reviewed the law of unseaworthiness and noted the absolute nature of the liability to seamen injured during the performance of their employment duties (356 F. 2d at 249-251; R65-R68). Judge Medina's opinion recognized that unseaworthiness may be found by a jury although only a portion of the ship's equipment is defective, although safe gear is available but is not used for the particular work involved and although the gear itself is not defective but a maladjustment or misuse of it creates a dangerous condition (356 F. 2d at 250; R68).

Nevertheless, Judge Medina's opinion concluded that these principles of liability apply only to defects, nonuse or misuse of gear or equipment, and do not apply where the dangerous condition arises out of nonuse of misuse of ship's personnel (356 F. 2d at 251-2; R69-R71). He ruled that with respect to the crew all that is required is that the vessel have an overall sufficiency of manpower aboard the ship, that any failure to provide sufficient personnel for a particular task may not constitute unseaworth-

iness and that liability, if any, arising out of such circumstances must be based on a proof of personal negligence or "imprudent action" on the part of the officer responsible for allocating and assigning the personnel or proof of inherent incompetence on the part of the officer (356 F. 2d at 251-2; R69-R71).

No citation of controlling authority was offered by Judge Medina for this arbitrary distinction between liability for improperly used or insufficient equipment and for improperly used or insufficient personnel.

Judge Smith, dissenting, stated that there were two independent grounds on which unseaworthiness could have been found. The first was that the handling of the otherwise seaworthy manila rope by only two men, when there was expert testimony that three or four men were required, constituted a misuse of otherwise seaworthy gear. According to Judge Smith the creation of a dangerous condition by such misuse of gear was a ground for unseaworthiness liability under principles stated by this Court in *Crumady* v. *The Joachim Hendrick Fisser,* 358 U. S. 423 (1959) and directly applicable recent decisions of the 3rd and 9th Circuits (356 F. 2d at 252; R72).

Secondly, upon the conceded principle that an insufficiently manned vessel may be found unseaworthy and petitioner's proof that there was a shortage of personnel provided at the time and place his task was done, unseaworthiness liability could lie. Judge Smith observed that respondent's defense "that the crew was as a whole complete" was "another form [of] the defense rejected in *Mahnich* v. *Southern S. S. Co.,* 321 U. S. 96 (1944)" (356 F. 2d at 253; R72). Judge Smith stated that the decision in *The Magdapur,* 3 F. Supp. 971 (S. D. N. Y. 1933) to the contrary, heavily relied upon by the majority (see 356 F. 2d at 251; R70), decided 33 years ago, "cannot

stand in the face of the development of the doctrine in the intervening years, illustrated by the holding in *Mahnich*" (356 F. 2d at 253; R72).*

POINT I

The decision below is clearly contrary to the settled law enunciated by this Court and followed by the lower Courts.

It is beyond dispute that overall insufficiency of manpower aboard ship constitutes an unseaworthy condition. *June T., Inc.* v. *King*, 290 F. 2d 404, 407 (5th Cir. 1961); *DeLima* v. *Trinidad Corp.*, 302 F. 2d 585, 587 (2d Cir. 1962); *In re Pacific Mail S. S. Co.*, 130 F. 76, 82 (9th Cir. 1904). As was stated in *June T., Inc.* v. *King, supra:*

> "to be inadequately or improperly manned is a classic case of an unseaworthy vessel." (290 F. 2d at 407).

The sole basis offered for upholding the dismissal below was the claim that notwithstanding the evidence that there was a shortage of manpower at the time and place the work was done, the existence of an overall sufficient complement of men aboard the ship rendered the claim invalid as a matter of law.

Precisely this defense was struck down by this Court in *Mahnich* v. *Southern SS. Co.*, 321 U. S. 96, 103-4 (1944). *Mahnich* involved a situation where:

> "A seaman . . . was injured . . . by a fall from a staging which gave way when a piece of defective rope supporting it parted. The rope was supplied by the mate when there was ample sound rope available for use in rigging the staging." (321 U. S. at 97)

---

* The "obsolescence" of pre-1940 lower court decisions in this area has been specifically noted by Professor Gilmore and Black's text. *The Law of Admiralty*, § 6-6, p. 253, fn. 12.

This Court held that unseaworthiness constituted a "rule of absolute liability" (321 U. S. at 101) to be applied regardless of "whether the mate's failure to observe the defect was negligent or unavoidable" (321 U. S. at 103) and regardless of whether the injured seaman himself "knew of the defective condition of the rope" (321 U. S. at 103).

The Court further stated:

> "Nor does the fact that there was sound rope on board to rig a safe staging, which might have been used to rig a safe staging, afford an excuse to the owner for the failure to provide a safe one." (321 U. S. at 103)

It specifically held that:

> "These conditions, which have generated the exacting requirement that the vessel or the owner must provide the seaman with seaworthy appliances with which to do his work, likewise require that safe appliances be furnished *when and where the work is to be done.*" (321 U. S. at 103-4) (Emphasis added)*

The fact that the total number of seamen in the crew was sufficient for the general operation of the vessel was long ago held no defense to the contention of unseaworthiness. *In Re Pacific Mail Steamship Co.*, 130 Fed. 76 (9th Cir. 1904). The Court there stated:

> "It is, as was said by Judge Hawley in Re Mayer (D. C.) 74 Fed. 885, 'the *duty of the owners* of a steamer carrying goods and passengers, not only *to provide* a seaworthy vessel, but they must also provide the vessel with a *crew adequate in number,*

---

* The importance of the *Mahnich* opinion was restated by this Court in 1960 in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 548—"While it is possible to take a narrow view of the precise holding in that case, the fact is that *Mahnich* stands as a landmark in the development of admiralty law."

> and competent for their duty with reference to all the exigencies of the intended route'; *not merely competent for the ordinary duties of an uneventful voyage,* but *for any exigency* that is likely to happen, such, for example, as unfortunately did happen in the present case—the striking of the ship on a reef of rocks—and the consequent imperative necessity for instant action to save the lives of passengers and crew. *The duty rested upon the petitioner to be prepared for such an emergency,* not only *by reason* of the statute cited, but by *the general maritime law.*" (130 Fed. at 82) (Emphasis added)

Overall sufficiency on board of ship's equipment is not a defense to the claim of unseaworthiness, for a seaman must be provided with sufficient and satisfactory equipment and help while performing the task involved in his injury. Otherwise the ship may be found unseaworthy, notwithstanding the presence on board of adequate equipment. *Street* v. *Isthmian Lines, Inc.,* 313 F. 2d 35, 36, 38 (2d Cir. 1963), cert. den. 375 U. S. 819.

In *Street* the hacksaw desired by the seaman to perform his task was present aboard the vessel but locked in the toolroom. The seaman instead made makeshift use of an available chisel with resultant injury to himself.

The Court unanimously held that the unseaworthiness claim was properly submitted to the jury (313 F. 2d at 38) and stated its agreement with the similar case of *Cox* v. *Esso Shipping Co.,* 247 F. 2d 629 (5th Cir. 1957). Extensive language from the *Cox* opinion was approved and incorporated into this Court's decision in *Michalic* v. *Cleveland Tankers, Inc.,* 364 U. S. 325, 327-8 (1960).

Similarly, it was recently held that although a vessel had proper ventilating equipment installed and fit to operate, the failure to cause the ventilating system to be put into operation while longhoremen were working in the hold meant that the vessel had "breached its warranty of sea-

worthiness". *Misurella* v. *Isthmian Lines, Inc.*, 215 F. Supp. 857, 859-860 (S. D. N. Y. 1963), aff'd 328 F. 2d 40, 41 (2d Cir. 1964).

As Judge Weinfeld there stated:

> "As to the latter claim [of unseaworthiness], the *fact that the vessel had an available ventilating system does not preclude a finding of unseaworthiness.* A *shipowner's duty* does not end if it provides adequate and seaworthy equipment; its duty *is a continuing one* and *requires* that such *equipment be furnished when and where the work is to be done.* The *failure to put it in effective operation* under the existing conditions *rendered the vessel* just as *unseaworthy* as if it lacked such equipment." (215 F. Supp. at 860) (Emphasis added.)

It should be sufficiently clear from *Mahnich, supra, Street, supra, Cox, supra,* and *Misurella, supra,* that the presence aboard ship of sufficient equipment does not, as a matter of law, compel a dismissal of the unseaworthiness claim, where the plaintiff has submitted evidence that as to his particular task he was not actually furnished sufficient or proper equipment "when and where the work was to be done" (*Mahnich,* 321 U. S. at 104).

The fact that the unsafe condition in the instant case arose out of the misuse or nonuse by the Third Mate of otherwise good or available personnel or equipment does not immunize the ship from a claim of unseaworthiness or restrict the claim to one solely of negligence.

The Third Mate may not have been negligent in failing to add another man to assist the plaintiff, in view of the lack of time in the fast-moving dock operation and the other tasks these personnel had to perform. (See R33, R39-R46). But regardless of the Mate's lack of negligence, if the adjustment or assignment of the personnel or method of work selected was such as to render the situation "unsafe", as the plaintiff's maritime expert testified (R38), an unseaworthiness claim properly lay.

It is the essence of unseaworthiness liability that it is "unrelated to principles of negligence law". *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 547 (1960). Lack of shipowner's or officer's opportunity to correct or even become aware of the dangerous condition or the speed with which the "threat materialized" are not defenses to a claim of unseaworthiness. *Reid* v. *Quebec Paper Sales & Transp. Co.*, 340 F. 2d 34, 35, 37 (2d Cir. 1965).

Unseaworthiness liability here also arose because a dangerous condition was caused by an improper method of operation and misuse of otherwise seaworthy equipment. The decisions below are in conflict with the basic principles laid down by this Court in *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423 (1959).

In *Crumady* stevedores used a winch and cargo loading equipment which had a maximum safe working load of 3 tons and was in good condition, but set the cut-off device at 6 tons (358 U. S. at 425). Although the equipment was not inherently defective and the dangerous condition arose only because of the maladjustment of the safety device, these acts gave rise to an unseaworthy condition, irrespective of whether there was also negligence. This Court stated:

> "The *winch*—an appurtenance of the vessel—*was not inherently defective* as was in the rope in the Mahnich case. *But it was adjusted* by those acting for the vessel owner *in a way that made it unsafe and dangerous for the work at hand.* While the rigging would take only three tons of stress, the cut-off of the winch—its safety device—was set at twice that limit. This was rigging that went with the vessel and was safe for use within known limits. Yet those limits were disregarded by the vessel owner when the winch was adjusted. *The case is no different in principle from loading or unloading cargo with cable or rope lacking the test strength for the weight of the freight to be moved.* In that case the cable or rope, in this case the winch, makes

the vessel pro tanto unseaworthy." (358 U. S. at 427-8). (Emphasis added.)

Similiarly, in the instant case, the Third Mate's adjustment of his work force, by providing only two men to haul or handle a load where the strength of additional men was required, and the method of operation of hauling the rope by only two men, must be deemed to have given rise to a jury issue as to the creation and presence of an unseaworthy condition. See also, *Morales* v. *City of Galveston*, 370 U. S. 165, 170 (1962); Note: *Doctrine of Unseaworthiness in the Lower Federal Courts*, 76 Harv. Law Rev. 819, 828 (1963).

This Court's opinions of the past 20 years have broadly expanded the concept and the coverage of unseaworthiness, as was explicitly noted in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 550 (1960), *Scott* v. *Isbrandtsen Co.*, 327 F. 2d 113, 123 (4th Cir. 1964), *Ferrante* v. *Swedish-American Lines*, 331 F. 2d 571, 578 (3rd Cir. 1964) and Gilmore & Black, *The Law of Admiralty* (1957), p. 253, fn. 12. It is now clear that a failure to provide reasonably safe working conditions to a seaman, albeit a temporary, slight or uncorrectible failure, may impose strict liability upon the shipowner rather than leave the burden upon the injured seaman alone. See, *e.g.*, *Mahnich* v. *Southern S.S. Co., Inc.*, *supra*; *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 92-6 (1946); *Boudoin* v. *Lykes Bros. S.S. Co., Inc.*, 348 U. S. 336, 339 (1955); *Crumady* v. *The Joachim Hendrick Fisser*, *supra*; *Mitchell* v. *Trawler Racer, Inc.*, *supra*; *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 327-8 (1960); *Gutierrez* v. *Waterman S.S. Corp.*, 373 U. S. 206, 213 (1963); *Reed* v. *The Yaka*, 373 U. S. 410, 413 (1963).

The instant case would carve out from the protection of these strict liability principles of unseaworthiness the ordinary, frequently recurring accident case where a low echelon laborer aboard ship is directed, alone or with in-

sufficient help, in the exigencies and possible haste of shipboard employment, to haul, pull, lift or tug a heavy piece of equipment or object aboard ship and is thus injured.

Had the manila line here involved been hauled on a dolly or hand truck of insufficient strength which collapsed, a jury issue as to liability for unseaworthiness would surely have been presented. That the load-carrying mechanism was too weak because of shortage of personnel can, in logic or social policy, dictate no different result.

Inexplicably, Judge Medina's opinion below applies this arbitrary and artificial distinction and insists on denying strict liability protection to the injured seaman if the order involves provision of personnel rather than selection of gear. Such a distinction is precisely contrary to this Court's view expressed in *Boudoin* v. *Lykes Bros. SS. Co.*, 348 U. S. 336 (1955), where it stated that on the issue of unseaworthiness there is:

> "no reason to draw a line between the gear on the one hand and the ship personnel on the other". (348 U. S. at 339)

Thus in *DiSalvo* v. *Cunard S.S. Co.*, 171 F. Supp. 813, 825-8 (S. D. N. Y. 1959) a seaworthy chute was handled improperly pursuant to the orders of a shipping company's officer and an injury to a maritime worker arising out of such mishandling.

Judge Herlands there specifically emphasized that:

> "The human factor may have as much practical effect in creating unseaworthiness as a mechanical flaw or physical defect." (171 F. Supp. at 825)

The petitioner's claim in this case has been, throughout, that the *condition* of two men straining on, hauling and supporting the 56 feet, and over 100 pounds, of 8-inch

manila line constituted unseaworthiness, regardless of whether that condition came about by way of an improvident order of the mate or because of some other exigency.

This ordinary type of accident situation of an insufficient number of men handling and supporting a load and strain too heavy for their strength and number—a situation that is perhaps more likely and common than almost any other to arise in the daily work of the manual laborers of a ship's crew—simply does not fit into "the almost theoretical construct" and "rare . . . circumstances" of a ship worker's accident arising out of "negligence but not unseaworthiness". See, *Pinto* v. *States Marine Corp. of Del.*, 296 F. 2d at 3; *Ezekiel* v. *Volusia S.S. Co.*, 297 F. 2d at 217; Instant Case, 356 F. 2d at 252, R61-R62, R70-R71). This large group of situations should not be banished by this Court from the protection of the ancient and humanitarian doctrine of seaworthiness.

The extraordinary and arbitrary nature of the decisions below is pointed up by the fact that petitioner's negligence claim was not dismissed, but the unseaworthiness claim was held legally insufficient (R56). Mr. Justice Frankfurter pointed out that "it will be rare that the circumstances of an injury will constitute negligence but not unseaworthiness", *Pope & Talbot* v. *Hawn*, 346 U. S. 406, 418 (1953). Professors Gilmore and Black have noted that such a circumstance is an "almost theoretical construct". Gilmore and Black, *The Law of Admiralty* (1957), p. 320.

The Second Circuit has now extended this "rare" and "theoretical" concept into a systematic barrier to jury determination of this common type of martime accident. See *Pinto* and *Ezekiel, supra*. The *Pinto* decision, adopted by a sharply divided Court (see 296 F. 2d at 8) and relied upon here by the trial and appellate courts below (356 F. 2d at 252; R61-R62, R70-R71), has drawn the criticism of com-

mentators * even before its expansion in the instant case, and has not been followed by any of the other circuits.

The petitioner produced proof that additional assistance should have been provided. Nevertheless, the courts below denied him the right to submit his case to a jury, unless he could prove that the officer at the scene, responding to the shipboard conditions, was inherently incompetent or negligent in directing the urgent work (356 F. 2d at 251-2; R69-R70).

It was precisely to avoid placing these difficult burdens of proof upon the injured seaman that the entire doctrine of unseaworthiness was created and developed. We respectfully submit that this Court should reverse the result below, lest a substantial exception to the humanitarian doctrine of unseaworthiness be carved out by the majority opinion below contrary to the teachings and policies oft-enunciated by this Court.

POINT II

The decision below is contrary to numerous decisions of the several Circuit Courts of Appeals.

There is direct conflict between the majority decision below in this case on one hand and the opinions of the Ninth Circuit in *American President Lines Ltd.* v. *Redfern*, 345 F. 2d 629 (1965) and the Third Circuit in *Ferrante* v. *Swedish-American Lines*, 331 F. 2d 571 (1964), pet. for cert. dimissed pursuant to R. 60, 379 U. S. 801 and

---

* See, Note: *Doctrine of Unseaworthiness in the Lower Federal Courts*, 76 Harv. Law Rev. 819, 824 (1963)—"Under *Mitchell* (the decision in *Pinto*) probably is error." See also, *Admiralty*: *Inadequate Manpower and the Unseaworthiness Doctrine*, 66 Columbia Law Rev. 1180, 1183, fn. 24 (1966)—*Pinto* and *Ezekiel's* "undue concern as to negligence principles" criticized.

Thompson v. *Calmar SS. Corp.*, 331 F. 2d 657 (3rd Cir. 1964), cert. denied 379 U. S. 913 on the other hand.* *Hroncich* v. *American President Lines, Ltd.*, 334 F. 2d 282 (3rd Cir. 1964), *Scott* v. *Isbrandtsen Co., Inc.*, 327 F. 2d 113 (4th Cir. 1964) and *Blassingill* v. *Waterman SS. Corp.*, 336 F. 2d 367 (9th Cir. 1964) are also in conflict with the prevailing position below in this case.

In *Redfern*, the seaman's immediate superior ordered him to go down alone to the engine room and open a large sea valve. The exertion of performing this task injured his back. On a libel tried before a judge alone, he recovered a substantial verdict specifically on the grounds of unseaworthiness (345 F. 2d at 630, 631).

The record on appeal in *Redfern* demonstrates that there was no claim of any overall shipboard shortage of manpower nor was it the "tendency to stick" of the valve that constituted the unseaworthy condition (345 F. 2d at 632). The Ninth Circuit specifically held that the vessel was unseaworthy on the grounds of being "improperly manned" (345 F. 2d at 632), and that the operation of the otherwise seaworthy valve by one man alone, where two men were required, constituted "a dangerous condition" (345 F. 2d at 631), justifying the trier of facts' findings of liability for unseaworthiness.

The conflict with the Ninth Circuit's recent opinion in *America President Lines, Ltd.* v. *Redfern*, 345 F. 2d 629 (1965) was recognized and emphasized by Judge Smith below (R72). Respondent's tortured distinction that the sea valve involved in *Redfern* was inherently defective because two men were required to turn it is directly rebutted by plain common sense and by the Ninth Circuit's

* Respondent conceded the conflict with the Third Circuit decisions below. See Appellee's Brief to the Court of Appeals, pp. 15-16, a copy of which has been lodged with the Clerk of the Court.

opinion (345 F. 2d at 631-2; R72).* The Court there stressed that sea valves are intentionally large and difficult to open, and are fit for their purpose only if they are so difficult. Liability for unseaworthiness was found by the Ninth Circuit in *Redfern* specifically because only one man was provided to open this otherwise seaworthy valve, and the condition of one man doing a job that required two men was—at least in the Ninth Circuit's view—a situation within the protection of the doctrine of unseaworthiness.

In the instant case, petitioner was lifting and hauling heavy manila line instead of opening a large sea valve. In the instant case, the plaintiff's expert testimony stated that 3 or 4 men were required to handle this equipment properly; in *Redfern*, the necessary minimum was two men.

We fail to see any substantive distinction between the *Redfern* case and the case at bar. *Redfern* is the same case of misuse of otherwise proper gear and provision of insufficient manpower as is the instant case.

In both *Ferrante* and *Thompson, supra,* the Third Circuit, in extensive opinions, held that where the method of operation and use of safe equipment gave rise to an unsafe condition, liability for unseaworthiness, without any showing of negligence on the part of the shipowner or its employees, could be found. The Third Circuit in *Thompson* quoted and itself emphasized the following from this Court's decision in *Morales* v. *City of Galveston,* 370 U. S. 165, 170 (1962):

> "'A vessel's unseaworthiness might arise from any number of individualized circumstances. Her gear might be defective, her appurtenances in dis-

* The same analysis of *Redfern*—as a case finding unseaworthiness because of inadequate manpower rather than because of any defect in gear—is set forth in *Admiralty*: *Inadequate Manpower and the Unseaworthiness Doctrine,* 66 Col. Law Rev. at 1182, 1185 (June, 1966).

> repair, her crew unfit. *The method of loading her cargo,* or the manner of its storage might be improper. (Emphasis supplied)' " (331 F. 2d at 65)

In *Ferrante,* the Court's opinion contained a full review of the recent authorities imposing unseaworthiness liability for adoption of improper "method of operation" (331 F. 2d at 577). It noted this Court's decisions indicating the "doctrinal trends" (331 F. 2d at 578) toward completing the protection of the maritime worker injured by an industrial accident. The Court reversed the lower court's dismissal of the libel on the ground that the "stevedore's method" (331 F. 2d at 578) rendered the vessel unseaworthy, stating:

> "Whether the operation is regarded as 'stowage' of the piles of boards as part of the discharge process, or the construction of a 'draft,' or as the mere use of the ship's equipment—the manila ropes —the fact remains that the stevedore 'failed to perform safely, a basis for liability including negligent and nonnegligent conduct alike', and that made the ship unseaworthy." (331 F. 2d at 578)

In *Scott* v. *Isbrandtsen Co., Inc.,* 327 F. 2d 113 (4th Cir. 1964), the longshoreman was injured when a bale that should have been handled by two men was handled by one man and got loose and fell upon him (327 F. 2d at 124). The Fourth Circuit held that this:

> ". . . method of operation may present a factual issue as to whether an unseaworthy condition is created for which the shipowner may be held liable" (327 F. 2d at 125-6).

The Court reversed and remanded for a new trial because of the trial court's failure to submit that issue to jury (327 F. 2d at 128).

Hroncich v. *American President Lines Ltd.,* 334 F. 2d 282, 285 (3d Cir. 1964) is almost identical to *Scott,* and

also holds that the method of operation, if improper and unsafe, may constitute unseaworthiness.

Similarly, the Ninth Circuit in *Blassingill* v. *Waterman Steamship Corp.*, 336 F. 2d 367, 368-70 (1964) held that "an improper method of using" sound gear may constitute unseaworthiness, and that it was error for the trial court to refuse to submit such an issue to the jury.

The above-cited recent cases make clear that at least in the Third, Fourth and Ninth Circuits stevedores and longshoremen can impose unseaworthiness liability upon a vessel by ordering or adopting an *improper method of work*. If such improper method of work, adopted without the control or knowledge of the shipowner's officers, can impose unseaworthiness liability, *a fortiori*, an improper work method, adopted by a crew member pursuant to a ship's officer's directive, may similarly render the vessel unseaworthy.

The issue of whether an unsafe condition is within the reach of the doctrine of unseaworthiness when seaworthy equipment is improperly or insufficiently used at the time and place of injury has caused considerable consternation and dispute among the judges of the Second Circuit Court of Appeals, the circuit which has within it the heaviest concentration of seamen's cases. *Pinto* v. *States Marine Corp. of Delaware*, 296 F. 2d 1 (2nd Cir. 1961), *cert. denied*, 369 U. S. 843 and *Ezekiel* v. *Volusia SS Co.*, 297 F. 2d 215 (2nd Cir. 1961) *cert. denied* 369 U. S. 843, both decided by sharply divided courts, held that the doctrine of unseaworthiness did not reach such a situation. On the other hand, particularly in recent years, the majority of the same court has tended to find that the doctrine of unseaworthiness does apply to such situations, albeit again over sharp dissents. See, *Radovich* v. *Cunard Steamship Co.*, 364 F. 2d 149 (2nd Cir. 1966); *Mosley* v. *Cia. Mar. Adra S.A.*, 362 F. 2d 118 (2nd Cir. 1966) and *Skibinski* v. *Waterman Steamship Corp.*, 360 F. 2d 539 (2d Cir. 1966).

Radovich, Mosley and *Skibinski* all involved longshoremen, whose successful suit depended upon a finding of unseaworthiness rather than negligence. The working personnel and orders were those of their fellow longshoremen, and absent unseaworthiness liability would not have been imposed on the ship owner.

Other recent instances, however, exist where the prevailing majority of the Second Circuit panel ruled against the maritime worker and declined to apply the protection of the unseaworthiness doctrine. See, e.g. *Walters* v. *Moore-McCormack Lines,* 309 F. 2d 191 (2d Cir. 1962), rehear. den. 312 F. 2d 893 (2d Cir. 1963); *Puddu* v. *Royal Netherlands S.S. Co.,* 303 F. 2d 752 (2d Cir. 1962), cert. den. 371 U. S. 840 and the instant case, decided in 1966.

A basic issue involved in this and the other recent maritime cases is whether the doctrine of unseaworthiness is available where a maritime worker is injured by an unsafe condition immediately rising out of improper or insufficient use of otherwise safe equipment or personnel, even though no appreciable time intervenes and no opportunity to correct the dangerous condition is available. In view of the continuing sharp divisions of attitude expressed in the Second Circuit opinions above cited and the clear relationship of the issues there raised and those raised in the instant case, a statement of this Court on this basic issue would be extremely beneficial to the maritime bar in the Second Circuit and throughout the entire country. This case presents an opportunity to this Court, whose crowded docket permits it to take so few maritime cases, dispositively to deal with these important issues in the opinion announcing its decision herein.

We respectfully direct this Honorable Court to the scholarship and reasoning set forth in the majority opinions in *Radovich, Mosley* and *Skibinski,* and we respectfully submit that the position there expressed is directly consistent with the attitudes enunciated by this Court in *Mah-*

nich v. *Southern SS Co.*, 321 U. S. 96, 101, 103-4 (1944) and *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 92-6 (1946) and more recently re-enunciated in *Reed* v. *The Yaka*, 373 U. S. 410, 413 (1963) and *Gutierrez* v. *Waterman SS Corp.*, 373 U. S. 206, 213, 215 (1963).

In *Reed*, Mr. Justice Black recalled this Court's classic enunciation of the underlying social policy applicable to seamen injured during the course of their employment and stated:

> "In Seas Shipping Co. v. Sieracki, 328 U. S. 85 (1946), . . . we noted particularly the hazards of marine service, the helplessness of the men to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the 'humanitarian policy' of the doctrine of seaworthiness." (373 U. S. at 413).

Similarly, Mr. Justice White, expressing the views of eight members of the Court in *Gutierrez*, emphasized the continuing viability of the *Sieracki* and *Mitchell* decisions of this Court (373 U. S. at 213) and upheld the "ineluctable" logic of the past authorities in allowing "recovery on unseaworthiness while denying it on negligence" (373 U. S. at 215).

Indeed, in *Gutierrez* Mr. Justice Harlan's dissent asserted that the only remaining exception to the reach of the doctrine of seaworthiness, at least before the majority decision in *Gutierrez*, was that the shipowner did not have an absolute duty with respect to the safety and condition of the cargo (373 U. S. at 217). Mr. Justice Harlan, as well as the eight members of the majority, fully accepted the concept that the shipowner's duty has become absolute and that the transitory nature of conditions arising aboard ship during the voyage in no way reduces the shipowner's liability to the injured seaman (373 U. S. at 217).

Since *Gutierrez* and *Reed* this Court has not spoken on the scope of the doctrine of seaworthiness. However

its most recent statements in *Gutierrez* and *Reed*, coupled with the concepts developed in *Mahnich* v. *Southern SS. Co.*, *Sieracki* v. *Seas Shipping Co.*, *Boudoin* v. *Lykes Bros. SS. Co.*, *Crumady* v. *Joachim Hendrick Fisser* and *Mitchell* v. *Trawler Racer, Inc.*, dictate reversal of the result below and a reaffirmation of the absolute and humanitarian doctrine of seaworthiness as a form of protection to those seamen and maritime workers who are injured aboard ships during the course of their work as a result of unsafe conditions arising out of defective, insufficient or improperly used equipment or personnel.

This case does not call upon the Court to determine that the shipowner is an insurer who must always provide an accident-free ship. A seaman who is exposed to injury by hurricane or unusual storms is not entitled—and no reported cases even indicate an attempt—to invoke the doctrine of unseaworthiness in seeking monetary compensation for his pain, suffering, limitation of motion, disability and loss of earnings for injuries so sustained. But when the seaman is injured during routine work procedures aboard ship, on the high seas, during docking operations—as here—or while the ship is tied up in port, he does assert that if the doctrine of unseaworthiness is to have substantial meaning and if the concept of an absolute obligation to provide a reasonably safe ship at the precise time and place the work is done is to have real purpose, then the doctrine of unseaworthiness is to mean what petitioner herein urges and is not to be artificially imprisoned within the restrictive boundaries urged by respondent below and adopted by the majority opinion. Such restrictive conceptions are out of keeping with the long line of decisions of this Court, are inconsistent with the numerous opinions above-cited of the Court of Appeals for the Second Circuit and the other Circuits, have been sharply criticized by the commentators, and are contrary to the underlying social policy and goals so clearly established by this Court.

The position urged by petitioner here has been applied by the lower courts in recognition of the "doctrinal trends" and direction of this Court's prior decisions. Thus in *Reid* v. *Quebec Paper Sales & Tramsp. Co.*, 340 F. 2d 34 (2d Cir. 1965), Judge Marshall, writing for the Court's majority, stated:

> "every act of negligence, no matter how short-lived, creates an unsafe condition for those exposed to it. Under the rubric of a 'breach of the warranty of seaworthiness' the courts have held shipowners responsible for accidents resulting from unsafe conditions of the workplace, regardless of whether the shipowner had actual or constructive notice or the means or opportunity of correcting them, and, *if all assessments of fault are to be truly irrevelant, it is not at all clear why this responsibility does not encompass any conduct at the workplace which creates a threat to the safety of the other workmen.*" (emphasis added) (340 F. 2d at 37).

Judge Weinfeld's eloquent opinion in *Rodriguez* v. *Constal Ship Co.*, 210 F. Supp. 38, 42-44 (S.D.N.Y. 1962), rejected a similar defense to that raised here. The shipowner there urged the unavailability of the doctrine of unseaworthiness to the risk of the type of injury which unavoidably arises during normal shipboard work and exigencies. Judge Weinfeld held that under the doctrine of unseaworthiness the very least the shipowner can do is "accept the financial consequences of injuries to men resulting from any uncorrected hazardous condition" (210 F. Supp. at 44). He noted that the "plea" of unavoidability:

> "in effect, amounts to a negation of the 'humanitarian policy' underlying the seaworthiness doctrine and if accepted would revive the now discarded concept of assumption of risk. . . . (T)o the contrary, the policy has been to assess the cost of the hazards of marine service, 'insofar as it is measurable in money', upon the shipowner and not the worker, since he '* * * is in position, as the worker is not,

to distribute the loss in the shipping community which receives the service and should bear its cost.' " (210 F. Supp. at 42-3)

See also, *e.g.*, *Farrante* v. *Swedish-American Lines*, 331 F. 2d 571, 577-8 (3rd Cir. 1964).

POINT III

The doctrine of unseaworthiness is fully applicable to the instant case and circumstances.

It is axiomatic that use of inadequate equipment such as a defective rope or cable to support a heavy load may constitute unseaworthiness. This doctrine should apply with equal logic and force to the use of inadequate manpower to support a heavy load. In short, whether a rope that is too thin or frayed or a number of men that are too few or weak are employed for a particular lifting operation aboard ship, the liability for unseaworthiness should be identical.

Notwithstanding its apparent common and fundamental nature, the issue of whether unseaworthiness liability may be found for shortage of personnel for a particular task on an otherwise fully manned vessel has never been dealt with directly by this Court. Except for the instant case, it has been determined directly in only two lower court decisions. These are *American President Lines, Ltd.* v. *Redfern*, 345 F. 2d 629 (9th Cir. 1965), decided in favor of the seaman, and *The Magdapur*, 3 F. Supp. 971 (S. D. N. Y. 1933), decided in favor of the shipowner.

The Magdapur was decided 33 years ago, long before this Court's landmark decisions in *Mahnich*, *Boudoin*, *Crumady* and *Mitchell* and well before the pioneering opinion of Judge Learned Hand in *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515 (2d Cir. 1952), which first established the equivalence of failures of ship's gear and ship's per-

sonnel in giving rise to liability under the doctrine of unseaworthiness.

Redfern decided in the seaman's favor, and the differing view of the lower courts in the instant case, have already attracted the attention of the commentators. Thus, *Admiralty: Inadequate Manpower and the Unseaworthiness Doctrine,* 66 Columbia Law Rev. 1180, 1181 (June, 1966) states:

> "two recent Court of Appeals decisions [*Waldron* and *Redfern*] have reached conflicting conclusions as to whether a failure to allocate an adequate number of crewmen to perform a particular duty comprises unseaworthiness."

The note sharply criticizes the decision below in this case, stating:

> "The distinction drawn in *Waldron* between improper use of sound gear, which may constitute unseaworthiness, and similar misuse of crew, which does not, finds little support in logic, or in the humanitarian policy which underlies the expanding remedy. Nor does precedent dictate the restricted duty when misuse of crew is involved." (66 Col. Law Rev. at 1182)

The article further critizes the Second Circuit injection of negligence doctrines into unseaworthiness determinations (66 Col. Law Rev. at 1183) and points out that *Waldron* conflicts with other recent Third and Fourth Circuit decisions (66 Col. Law Rev. at 1183, fn. 22 and at 1185, fn. 39). It concludes that the *Waldron* doctrine rests on "irrational distinctions" contrary to the policy and humanitarian trends dictated by this Court's opinions over the past "two decades" (66 Col. Law Rev. at 1185).

Provision of insufficient personnel or assistance to carry, move or lift a heavy object or load aboard ship often gives rise to injury to lower echelon maritime employees. As technological advancement improves and refines mechanical

equipment, those injuries which do occur are more and more the result of the human misuse of otherwise fit gear. Unless the result below is reversed, more and more seamen's cases will be taken away from the jury and dismissed as a matter of law.

If the decision below were left standing, it would breath new vitality into the *Magdapur* doctrine upon which it specifically relies (356 F. 2d at 251, 2; R61, R70). As the authorities above cited demonstrate, this would be contrary to all that has been achieved and developed by this Court in this area over the past 25 years.

This Court has emphasized that in seamen's cases the jury "plays a pre-eminent role". *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 523 (1957); *Michalic* v. *Cleveland Tankers Inc.*, 364 U. S. 325, 330-1 (1960). It has repeatedly held that directed verdicts and dismissals of seamen's claims are to be granted only in the rarest circumstances. The policy of the majority of this Court has been to prevent "erosion" of the role of the jury in the determination of FELA and seamen's cases, and reversals have been particularly granted "when the statutory or constitutional right to decision by a jury" has been interfered with below. See, *e.g.*, *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 509 (1957).

In the instant case, petitioner presented eye-witness testimony that he was injured while hauling a heavy manila line on the ship's deck, while acting pursuant to orders and in the direct line of the duties of his maritime employment. Petitioner also presented expert testimony by a ship's master of 50 years' maritime experience that the performance of this task by only two men involved a shortage of personnel and an unsafe method of operation.

Petitioner's injury was caused by an insufficiency of personnel for the particular task at hand and by adoption of an improper work method, or, as Judge Smith dissenting below alternatively phrased it, through "using equipment in a manner which makes it unsafe" (R72).

The trial court's dismissal of this claim as a matter of law took away its determination from the jury which had heard the evidence. Petitioner was entitled to a jury determination of his claim and the judicial dismissal below should be reversed, with remand to the District Court for a new trial.

CONCLUSION

Petitioner was improperly denied a jury trial of his claim for recovery of damages arising out of injuries sustained during his maritime employment.

At the time and place petitioner was injured aboard defendant's vessel an insufficient number of men were provided for the task at hand, and there was testimony that this constituted an unsafe condition.

There was testimony that the manner of using and moving the heavy manila line at the time and place of petitioner's injury was unsafe and improper, and the condition which thus arose was within the protection of the doctrine of unseaworthiness.

The judicial dismissal below of petitioner's claim was error, the judgments below must be reversed and the action should be remanded to the District Court for a new trial.

Respectfully submitted,

THEODORE H. FRIEDMAN,
Attorney for Petitioner.

THEODORE H. FRIEDMAN,
HENRY ISAACSON,
EVE M. PREMINGER,
of Counsel.

BLANK

PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 233

JAMES J. WALDRON,

Petitioner,

—against—

MOORE-McCORMACK LINES, INC.,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

WILLIAM M. KIMBALL
Counsel for Respondent
25 Broadway
New York, New York 10004

INDEX

Citations

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 233

JAMES J. WALDRON,

Petitioner,

—against—

MOORE-McCORMACK LINES, INC.,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

Petitioner's brief (pp. 1-2) adequately sets forth the citation of the Court of Appeals' opinion below, the fact that the District Court's opinion is unreported, and the jurisdictional requisites.

Question Presented

If all other crewmembers are busy performing other urgent tasks necessary to dock a vessel which is subject to the manning requirements of 46 U.S.C.A. § 222, does vacuous hindsight opinion testimony that additional sailors should have been assigned to assist two able-bodied seamen execute a non-negligent last minute order to put out another mooring line raise a jury question of whether the fully, properly, competently manned ship was unseaworthy, there being no defect in the vessel's hull, appurtenances, or equipment?

Statute Involved

46 U.S.C.A. § 222 (hereinafter fully set forth in Appendix A) requires that a vessel of the class here involved "shall have in her service and on board such complement of licensed officers and crew * * * as may in the judgment of the Coast Guard be necessary for her safe navigation."

Statement

Petitioner, "an able seaman and member of the crew of the SS Mormacwind" (R 63), was injured during the "very good" (R 48) "11 minutes" (R 64) docking of respondent's ship.

"According to the Coast Guard certificate [issued pursuant to 46 U.S.C.A. § 222], the vessel was only required to carry on deck in the unlicensed department six able and three ordinary seamen; and in addition to the six able and three ordinary seamen she had a boatswain and two deck utility men. Her articles thus showed that she had three more unlicensed deck crewmen than her certificate required. At the time of the alleged accident, the vessel had on board every one of the deck crew shown on the articles." (R 61)

The ship was docked "between 1:20 and 1:31 P.M." (R 64) and "the full complement on the aft docking station during those hours would consist of five unlicensed members of the deck department under the command of the third officer, the five normally being three able and two ordinary seamen." (R 61) Since one of those ordinary seamen "was in the ship's hospital" (R 18), he was replaced by an experienced able seaman (R 16-17) who, in addition to his superior rating, "was exceptionally strong and capable" (R 64). "At

the time of the alleged accident and for some time prior thereto, there were five unlicensed men at the aft docking station, consisting of four able-bodied seamen and one ordinary seaman; thus the place of one ordinary seaman had been taken by an able-bodied seaman." (R 61)

"It is not disputed that the vessel was properly and fully manned and that the crew including the [third] officer who gave the order were in all respects competent to perform their duties. * * * nor is there any claim of a defect in the vessel or any of its gear, equipment and appliances." (R 63-64)

At first, petitioner and "one man assisting" (R 5) put out "a couple of [mooring] lines going through the aft chock" (R 4), during which time "Nothing unusual" occurred (R 4). "As the [docking] operation progressed with the requisite dispatch" (R 64) and because of "a last minute decision of the pier master as the vessel was finally being placed in position" (R 59), "the officer on the bridge decided another mooring line was necessary as a spring line and the order was passed on to [the third officer in charge of the aft docking station]. As all the other men were occupied with urgent tasks connected with other lines, [the third officer] assigned to [petitioner] and another able seaman, who was exceptionally strong and capable, the task of putting out this new line 'as quickly as possible'." (R 64)

The additional spring line was "new manila line" (R 20) "eight inches in circumference" (R 7) and "was coiled on a grating on the deck * * * approximately 56 feet away" (R 63) from the chock through which it was let out. After the other able seaman proceeded to the chock with the eye and a 15 feet bight of line on his shoulders (R 64-65), petitioner "was tugging at the top of the coil, attempting to

flake some slack along the deck, when he slipped and fell." (R 65) Although petitioner asserts without supporting reference that 56 feet of 8 inch manila line weigh 104.72 pounds (brief, p. 3), there is no evidence or reasonable inference that petitioner and the other able seaman, either jointly or singly, were hauling or carrying anything approaching 56 feet of line when petitioner slipped and fell "perhaps ten feet" (R 10) from the coiled line.

Petitioner claimed that the deck was unseaworthy and that the third officer was negligent in failing to order more men to help put out the additional line. "The issue of negligence and several features of the issue of unseaworthiness, as claimed by [petitioner], were submitted to a jury who returned a [general] verdict for [respondent]." (R 63) "The findings implicit in the verdict are: (1) that the order given by the third mate was not a negligent order, that is to say, [petitioner] failed to convince the jury that under the circumstances a reasonably prudent man would not have given such an order; and (2) that the vessel was not unseaworthy because the deck was tacky from wet paint or was wet and slippery." (R 64)

Petitioner also claimed "that the condition which resulted from the third mate's apportioning of the men, i.e., two men assigned to do the work of three ([petitioner's] expert testified that it was his opinion that the work ordered done was a three-four man job), regardless of whether the order was improvident or not, constituted unseaworthiness." (R 61) The District Court "directed a verdict for the [respondent] on that claim" (R 61) and a majority of the Circuit Court affirmed (R 65), holding that: "With respect to the crew, including the officers, all that is or has been required is that the vessel be properly manned.

That is to say, in order to be 'reasonably suitable for her intended service' the vessel must be manned by an adequate and proper number of men who know their business. There is no requirement that no one shall ever make a mistake. If someone is injured solely by reason of an act or omission on the part of any member of a crew found to be possessed of the competence of men of his calling, there can be no recovery unless the act or omission is proved to be negligent. We have found no authority to the contrary. Indeed, this rule seems to us to be based not only on a uniform course of judicial opinion but also on sound reason. In the management of the vessel both at sea and in port, moments of lesser or greater urgency are bound to occur when quick decisions have to be made, and there is always the possibility of what may appear by way of hindsight to be errors of judgment. To alter this rule, in the absence of legislation, would, we think, come close to requiring the shipowner to provide 'an accident proof' ship, which the teachings of Mr. Justice Stewart's landmark and highly clarifying opinion in *Mitchell* v. *Trawler Racer, Inc.*, 1960, 362 U.S. 539, 550, *supra,* specifically negates." (R 69-70)

Petitioner's brief distorts the record by quoting testimony out of context to induce a mistaken belief that petitioner's expert testified that the third mate's 2 men order was an "unsafe operation" (brief, pp. 3-4). This opinion testimony related solely to petitioner's claim, which the jury decided in respondent's favor, that "with regard to the preparation for the docking operation" (R 37), the additional line should have been flaked out of the coil and alongside the chock before the operation began (R 35-38).

Petitioner's brief also exceeds the record by repeatedly inferring nonexistent expert testimony that the mate's or-

der created a "dangerous", "unsafe condition" resulting from "nonuse or misuse" of "available" ship's personnel. The Circuit Court emphasized by quotation (R 63) that the opinion testimony concerning the propriety of the mate's order was elicited solely by questions employing the phrase "safe and prudent seamanship" (R 27, 33, 42, 46). The Circuit Court also emphasized (R 65) the vacuousness of this opinion testimony, which specifically excluded (R 46) the effect "of twenty-five common factors which the person in charge of this operation would necessarily have to take into consideration in order to safely dock the ship [even though] those factors would have a bearing upon whether what the mate did was safe, prudent and seamanlike" (R 45).

Summary of Argument

The Court has never decided the question presented. Based on "a uniform course of judicial opinion" and "sound reason" (R 69), several lower courts have decided the question in favor of shipowners and there is "no authority to the contrary". (R 69) Since 46 U.S.C.A. § 222 empowers the Coast Guard to fix the crew complement necessary for safe navigation of vessels, which the Coast Guard has done by comprehensive Manning Requirements, 46 C.F.R. Part 157, "after a thorough consideration of • • • the many factors involved", 46 C.F.R. § 157.15-1(b), a contrary determination would "come close to requiring the shipowner to provide 'an accident proof' ship". (R 69)

Argument

Petitioner's brief (p. 25) correctly states that "the issue of whether unseaworthiness liability may be found for shortage of personnel for a particular task on an otherwise fully manned vessel has never been dealt with directly by this Court", and goes on to say that: "Except for the instant case, it has been determined directly in only two lower court decisions. These are *American President Lines, Ltd.* v. *Redfern,* 345 F. 2d 629 (9th Cir. 1965), decided in favor of the seaman, and *The Magdapur,* 3 F. Supp. 971 (S.D.N.Y. 1933), decided in favor of the shipowner." The question was also dealt with in *Koleris* v. *S.S. Good Hope,* 241 F. Supp. 967, 970 (E.D. Va. 1965), and *Mable* v. *Matson Navigation Co.,* 1963 A.M.C. 925 (N.D. Cal. 1963), both decided in favor of the shipowner.

A majority of the court below "found no authority to the contrary" (R 69), including *American President Lines, Ltd.* v. *Redfern, supra,* which involved "a stuck valve that could only be 'broken' by the use of tools or several men working together." (R 68) That *Redfern* concerned basically unseaworthy equipment is made indisputably clear by the unreported memorandum opinion of the Northern District of California Court (hereinafter set forth in Appendix B) which, without reference to any claimed lack of tools or manpower, simply held "that the vessel herein is unseaworthy in that the low sea suction valve on the port side was stuck or frozen, constituting an unseaworthy condition of the ship's equipment". On appeal, the Ninth Circuit Court undertook to construe "Redfern's proposed findings [which] were adopted without any changes by the court. They contain many confusing and ambiguous state-

ments; they go beyond the clear import of the memorandum * * *. In substance, the critical findings are that opening a stuck sea valve, like the one involved in this case, is a hazardous operation, unless performed by two men or a single man using adequate tools * * *. A stuck sea valve, the trial judge found * * * is suitable only if operated by two men; otherwise, it [i.e., the stuck valve] constitutes a dangerous condition." 345 F. 2d, pp. 630-631.

Here, there is no testimony to support any finding that the additional spring line was "reasonably suitable for [its] *intended* service", *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960), [italics added], only if handled by more than two able-bodied seamen. Indeed, if there had been any such evidence, use of only two sailors to put out the line would not have made the *new manila line* any less fit for its intended purpose, but would have constituted an attempt to use the line for an *unintended* purpose. If a mate improvidently ordered a seaman to paint the deck with a new hammer, the hammer would not be transformed into an unseaworthy tool since it was not intended to be used as a paint brush.

Seeking to thrust his case within the penumbra of decisional law, petitioner's point I cites cases involving negligent failure to provide available safe gear which resulted in use of unsuitable gear, and petitioner's point II cites cases involving negligent use of sound gear in a manner which created an unseaworthy condition. Neither group of citations is apposite. There was no evidence, or even a claim, that the new manila spring line was less than reasonably fit for its intended use or that there was any other available method of putting out the line, and the jury found that the mate's order directing the manner in which the line was to be put out was not negligent.

Petitioner's claim is similar to one in *Pinto* v. *States Marine Corporation of Delaware*, 296 F. 2d 1 (2 Cir. 1961), cert. denied 369 U.S. 843 (1962), upon which both courts below relied (R 61-62, 70-71). There, "the third mate directed Pinto and a helper Fantroy, to carry a heavy signal light from the wheel-house to the engine room * * *. [Plaintiff claimed] 'operating' unseaworthiness, in that some other method should have been adopted for conveying the light to the engine room, * * * [plaintiff's expert having testified] that in fact 'it was unsafe to take anything down as heavy as the light without the aid of a block and fall.'" 296 F. 2d, p. 2 The Court rejected plaintiff's contention that "the work procedure" constituted unseaworthiness and held that "plaintiff, under his claim of 'operating' unseaworthiness, was entitled to raise only the mate's overall competence". 296 F. 2d, p. 3

As the court below held, it "is inherent in the traditional triple concept of unseaworthiness [that w]ith respect to the crew, including the officers, all that is or has been required is that the vessel be properly manned." (R 69) Thus, in *June T., Inc.* v. *King*, 290 F. 2d 404 (5 Cir. 1961), misrelied upon in *American President Lines, Ltd.* v. *Redfern, supra*, 345 F. 2d, p. 632, a shrimp boat which normally had a 3 man crew was held unseaworthy when crewed by only 2 men. *In re Pacific Mail S.S. Co.*, 130 Fed. 76, 82 (9 Cir., 1904), held a vessel unseaworthy because her Chinese sailors could not understand the orders of their English-speaking officers and were, therefore, "incompetent". *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U.S. 336, 337 (1955), modified 350 U.S. 811 (1955), and *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515, 518 (2 Cir. 1952), cert. denied 343 U.S. 966 (1952), held that a ship might

be unseaworthy due to the presence of a crewmember who was not "equal in disposition and seamanship to the ordinary men in the calling."

Nothing comparable exists in this case. The vessel had more sailors aboard than her Coast Guard certificate required and there is no claim or evidence that any member of the crew was incompetent.

In addition to warping soundly conceived jurisprudence, a decision that a fully, competently manned ship could be found unseaworthy because of hindsight testimony that otherwise occupied crew members should have been ordered to assist in executing a last minute decision to put out another docking line would be incompatible with 46 U.S.C.A. § 222 and implementing Coast Guard regulations.

46 U.S.C.A. § 222 requires that a vessel of the class here involved "shall have in her service and on board such complement of licensed officers and crew • • • as may in the judgment of the Coast Guard be necessary for her safe navigation." "The express purpose of 46 U.S.C.A. § 222 is that of promoting 'safe navigation', upon which standard the Coast Guard is required to exercise its judgment in determining the 'necessary' complement of a vessel's crew and officers." *Pierro* v. *Carnegie-Illinois Steel Corp.*, 186 F. 2d 75, 78, fn. 5 (3 Cir. 1950).

Pursuant to 46 U.S.C.A. § 222, the Coast Guard has promulgated comprehensive "Manning Requirements", 46 C.F.R. Part 157, including "the minimum complement of officers and crew necessary for the safe navigation of the vessels", 46 C.F.R. § 157.15-1(a), as "determined by the Officer in Charge, Marine Inspection, after a thorough consideration of the applicable laws cited in § 157.01-10(b) and

the regulations in this part together with the many factors involved, such as size, type, proposed routes of operation, cargo carried, type of business in which employed, etc." 46 C.F.R. § 157.15-1(b).

Thus, with respect to the complement necessary to safely man its vessels, Congress has relieved the shipowner of "the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it", *Time, Inc.* v. *Hill*, —— U.S. ——, 35 LW 4108, 4112-4113 (January 9, 1967). Instead of being exposed to the unpredictable consequences of vacuous second guessing by "experts" retained by their opponents, cf., *Central Railroad Co. of New Jersey* v. *Tug Marie J. Turecamo*, 238 F. Supp. 145, 148 (E.D.N.Y. 1965), shipowners can rely upon the Coast Guard to fix safe manning scales "after thorough consideration" of "the many factors involved".

As the court below recognized, a contrary decision would "come close to requiring the shipowner to provide 'an accident proof' ship, which the teachings of Mr. Justice Stewart's landmark and highly clarifying opinion in *Mitchell* v. *Trawler Racer, Inc.*, 1960, 362 U.S. 539, 550, *supra*, specifically negates." (R 69-70) Apart from physical defects, undermanning, or an incompetent crew, the only likely cause of shipboard injury to a seaman is as the result of carrying out an order. If an order, to say nothing of a non-negligent order, can make the vessel unseaworthy even though there is no deficiency of hull, gear, or personnel, then there would be no accident for which a seaman could not obtain a verdict for damages, particularly as there will never be a shortage of litigation "experts" who can be induced to countermand any order.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

WILLIAM M. KIMBALL
Counsel for Respondent

BLANK

PAGE

APPENDIX A

46 U.S.C.A. § 222.

No vessel of the United States subject to the provisions of title 52 of the Revised Statutes or to the inspection laws of the United States shall be navigated unless she shall have in her service and on board such complement of licensed officers and crew including certificated lifeboat men, separately stated, as may in the judgment of the Coast Guard be necessary for her safe navigation. The Coast Guard shall make in the certificate of inspection of the vessel an entry of such complement of officers and crew including certificated lifeboat men, separately stated, which may be changed from time to time by indorsement on such certificate by the Coast Guard by reason of change of conditions or employment. Such entry or indorsement shall be subject to a right of appeal, under regulations to be made by the Commandant of the Coast Guard, to the Commandant of the Coast Guard, who shall have the power to revise, set aside, or affirm the said determination.

If any such vessel is deprived of the services of any number of the crew including certificated lifeboat men, separately stated, without the consent, fault, or collusion of the master, owner, or any person interested in the vessel, the vessel may proceed on her voyage if, in the judgment of the master, she is sufficiently manned for such voyage: *Provided,* That the master shall ship, if obtainable, a number equal to the number of those whose services he has been deprived of by desertion or casualty, who must be of the same grade or of a higher rating with those whose places they fill. If the master shall fail to explain in writing the cause of such deficiency in the crew including cer-

tificated lifeboat men, separately stated, to the Coast Guard within twelve hours of the time of the arrival of the vessel at her destination, he shall be liable to a penalty of $50. If the vessel shall not be manned as provided in this section, the owner shall be liable to a penalty of $100, or in case of an insufficient number of licensed officers to a penalty of $500. R.S. § 4463; Apr. 2, 1908, c. 123, § 1, 35 Stat. 55; Mar. 3, 1913, c. 118, § 1, 37 Stat. 732; Mar. 4, 1915, c. 153, § 14, 38 Stat. 1182; May 11, 1918, c. 72, § 1, 40 Stat. 548; June 30, 1932, c. 314, § 501, 47 Stat. 415; May 27, 1936, c. 463, § 1, 49 Stat. 1380; 1946 Reorg. Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097.

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

IN ADMIRALTY

No. 28393

JOHN REDFERN,

Libelant,

vs.

AMERICAN PRESIDENT LINES, LTD., a corporation,

Respondent.

MEMORANDUM OPINION

This is an action by libelant in Admiralty against American President Lines, Ltd., owner and operator of the S.S. PRESIDENT HOOVER, for damages and personal injuries sustained by libelant, a seaman, while a crew member of the ship.

Libelant's complaint is two counts:

1. Unseaworthiness of the vessel, and,

2. Negligence of the ship owner.

Jurisdiction herein is in Admiralty under the General Maritime Law and under the Jones Act.

The Court is of the opinion that the vessel herein is unseaworthy in that the low sea suction valve on the port side was stuck or frozen, constituting an unseaworthy condition of the ship's equipment; that this unseaworthy condition was the cause of libelant's injuries herein and libelant was not contributorily negligent and received physical injuries resulting in the following damages:

1. Actual wage loss to date	$ 8,000.00
2. Loss of future wages (Partial loss of 33⅓%, based on annual wage of $4,500 for work expectancy of 16 years = $24,000, discounted to present value at 4%)	17,478.00
3. Pain and suffering	15,000.00
Total	$40,478.00

Libelant herein is to recover costs. Counsel for libelant is to prepare Findings of Fact, Conclusions of Law, and Decree.

Dated: December 4, 1963.

/s/ ALBERT C. WOLLENBERG
United States District Judge

BLANK

PAGE

IN THE

Supreme Court of the United States

October Term, 1965

No. 233

JAMES J. WALDRON,

Petitioner,

against

MOORE-McCORMACK LINES, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

THEODORE H. FRIEDMAN,
Attorney for Petitioner,
Office & P. O. Address,
1501 Broadway,
New York, N. Y. 10036.

INDEX

Table of Cases Cited

Statute Cited

Other Authorities Cited

IN THE

Supreme Court of the United States

October Term, 1965

No.

JAMES J. WALDRON,

Petitioner,

against

MOORE-McCORMACK LINES, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

Respondent attempts to characterize the important controversy raised by this case as a dispute over the sufficiency and probative value of the petitioner's expert testimony at trial. This is an ill-conceived effort to belittle the issues and avoid review by this Court, and respondent's brief studiously ignores the contrary view taken by the two Courts below. Respondent's brief in effect concedes that if the record was sufficient to present a jury issue, a basic and novel question is raised by this case.

The District Court Judge recognized the presence of this serious legal question and was obviously troubled by it. It was first presented during the trial testimony of the petitioner's maritime expert (28a, 31a-32a), a full captain with over 40 years maritime experience (22a-23a). The ruling was then in petitioner's favor, and the captain's testimony was ruled relevant (28a).

The trial lasted 14 days (1a). On the last day of trial the District Court Judge reversed himself and dismissed this aspect of the unseaworthiness claim (55a-56a).

Petitioner's post-trial motion was not decided until five months after submission (1a). A careful—albeit, we believe, erroneous—opinion was then written by the trial judge (A13-A14) clearly indicating that the trial evidence sufficiently presented the legal issue, but in view of "certain language" in two recent Second Circuit opinions, adhering to his original dismissal decision.[1] Nowhere did the District Court Judge state that the evidence—opinion or otherwise—presented by petitioner was insufficient, without probative value, or incapable of requiring an answer to the legal issue presented. His careful treatment of the legal issue is completely at odds with respondent's counsel's present attempts to denigrate the importance of the question.

Similarly, the Court of Appeals for the Second Circuit, both in its majority and dissenting opinions, found the evidence sufficient to raise the important legal question and treated the legal issue fully. The effort plainly invested in the preparation of Judge Medina's extensive opinion (A2-A10) is totally inconsistent with a view that the controversy rested on insubstantial, unprobative or insufficient trial evidence. Judge Smith's dissenting opinion similarly deals directly with the legal questions and could not be based on anything but a determination that the record evidence below sufficiently presented these issues.

---

[1] These Second Circuit opinions were *Pinto* v. *States Marine Corp.*, 296 F. 2d 1 (2d Cir. 1961) and *Ezekiel* v. *Volusia S.S. Co.*, 297 F. 2d 215 (2d Cir. 1961) (A14). The prevailing views in these cases have not been cited with approval by other circuit courts, their authority has been sharply challenged by other Second Circuit judges (296 F. 2d at 8; see also, *Nuzzo* v. *Rederei, A/S Wallenco*, 304 F. 2d 506, 512-3 (2d Cir. 1962, Clark J. dissenting), and *Pinto* is concededly in conflict with opinions of other circuits (296 F. 2d at 7, fn. 6). Both *Pinto* and *Ezekiel* have drawn critical comment. See, *The Doctrine of Unseaworthiness in the Lower Federal Courts*, 76 Harvard Law Rev. 819, 824 (1963); *Admiralty: Inadequate Manpower and the Unseaworthiness Doctrine*, 66 Columbia Law Rev. 1180, 1183, fn. 24 (1966).

Respondent's brief seeks to cite Judge Medina's opinion to the effect that the result below was based upon "a uniform course of judicial opinion" with no "authority to the contrary" (Resp. Br., p. 1). However, Judge Medina's opinion cited no supporting authority on the critical issue here presented except a 1933 District Court opinion (*The Magdapur,* 3 F. Supp. 971) and two recent Second Circuit opinions (*Pinto, supra,* and *Ezekiel, supra*) (see A9-A10). The "obsolescence" of pre-1940 lower court decisions in this area has been specifically noted by Professors Gilmore and Black (*The Law of Admiralty,* § 6-6, p. 253, fn. 12), and the fact that divided panels of the Second Circuit have previously made similar rulings hardly renders their view free from certiorari and review. The weight of the authorities actually cited by the judges of the Court of Appeals was in petitioner's favor, for Judge Smith's dissenting opinion (A10-A12) cites leading cases of this Court and recent decisions of the Third and Ninth Circuits as requiring reversal of the result below.

Nothwithstanding its belittling brief to this Court and its attempt to label this case as "peculiar" (Resp. Br., p. 5), respondent conceded below that affirmance would place the Second Circuit in direct conflict with the Third Circuit in an area where the facts were bound to recur. See *Ferrante* v. *Swedish-American Lines,* 331 F.2d 571 (3rd Cir. 1964), *cert. dismissed,* 379 U. S. 801 and *Thompson* v. *Calmar S.S. Corp.,* 331 F.2d 657 (3rd Cir. 1964), *cert. den.* 379 U. S. 13. (See Appellee's Brief to the Court of Appeals, pp. 15-16.)

The instant case, and its conflict with the Ninth Circuit decision in *Redfern,* has already attracted the critical attention of the commentators. Thus, *Admiralty: Inadequate Manpower and the Unseaworthiness Doctrine,* 66 Columbia Law Rev. 1180, 1181 (June, 1966) states:

> "two recent Court of Appeals decisions [*Waldron* and *Redfern*] have reached conflicting conclusions as

> to whether a failure to allocate an adequate number of crewmen to perform a particular duty comprises unseaworthiness."

The note sharply criticizes the decision below, stating:

> "The distinction drawn in *Waldron* between improper use of sound gear, which may constitute unseaworthiness, and similar misuse of crew, which does not, finds little support in logic, or in the humanitarian policy which underlies the expanding remedy. Nor does precedent dictate the restricted duty when misuse of crew is involved." (66 Col. Law Rev. at 1182)

The article further criticizes the Second Circuit injection of negligence doctrines into unseaworthiness determinations (66 Col. Law Rev. at 1183), points out that *Waldron* conflicts with other recent Third and Fourth Circuit decisions (66 Col. Law Rev. at 1183, fn. 22 and at 1185, fn. 39) and concludes that the *Waldron* doctrine rests on "irrational distinctions" contrary to the policy and humanitarian trends dictated by this Court's opinions over the past "two decades" (66 Col. Law Rev. at 1185).

The conflict with the Ninth Circuit's recent opinion in *America President Lines, Ltd.* v. *Redfern*, 345 F.2d 629 (1965) is denied by respondent, although recognized and emphasized by Judge Smith below (A11). Respondent's tortured distinction that the sea valve involved in *Redfern* was inherently defective because two men were required to turn it is directly rebutted by plain common sense and by the Ninth Circuit's opinion (345 F.2d at 631-2; A11).[2] The

---

[2] The same analysis of *Redfern*—as a case finding unseaworthiness because of inadequate manpower rather than because of any defect in gear—is set forth in *Admiralty: Inadequate Manpower and the Unseaworthiness Doctrine*, 66 Col. Law Rev. at 1182 1185 (June, 1966).

Court there stressed that sea valves are intentionally large and difficult to open, and are fit for their purpose only if they are so difficult. Liability for unseaworthiness was found by the Ninth Circuit in *Redfern* specifically because only one man was provided to open this otherwise seaworthy valve, and the condition of one man doing a job that required two men was—at least in the Ninth Circuit's view—a situation within the protection of the doctrine of unseaworthiness.[3]

Petitioner's experienced maritime expert, Captain Darrigan, held the same view in this case. He testified:

> "I would say to drag a line 60 feet or more would need 3 or 4 men at least of that type and weight. (33a)
>
> • • •
>
> I would figure that that is an 8 inch mooring line and to drag it along the deck or the street, there is a lot of physical strength needed. (33a)
>
> • • •
>
> My opinion is that this was an unsafe operation. (37a)
>
> • • •
>
> Q. . . . do you nevertheless feel that safe and prudent seamanship dictated that 3 or 4 men be assigned to take this line from the place marked with the R to the chock marked with the II? A. I do. (42a)
>
> • • •

[3] Although there is an apparent conflict as to the ship's liability for unseaworthiness where improper work methods are used with otherwise safe gear within Professors Gilmore & Black's text [*The Law of Admiralty* (1957) (compare § 6-39, p. 320, fn. 221 with § 6-5[1, 2], p. 252)], even § 6-39 concedes that nonliability, as a matter of law, is a "rare" and "almost theoretical" circumstance.

Q. What is your opinion as to whether the vessel was sufficiently manned with regard to the aft deck docking gang? A. I said no." (53a)[4]

Respondent's counsel's question on cross-examination as to the hypothetical "25 common factors" relevant to the docking operation (44a) may have been good jury trial tactics, but was hardly probative in the circumstances of this case. The docking was at a Brooklyn pier in New York Harbor, at high noon on a May day (16a). According to the log it took only 11 minutes, with no unusual weather, tide or shipping conditions (47a-48a). To a man of Captain Darrigan's experience, there were no special or unusual conditions requiring adjustment of his basic view that the safety of the job required three or four men. On redirect examination, he specifically stated that the hypothetical "25 other factors" in no way changed his opinion that the particular job here involved, under the actual circumstances shown by the ship's log, would require three or four men (46a).[5]

---

[4] Captain Darrigan's expert testimony was probably not even necessary for petitioner's *prima facie* case. A jury could well have found that the safe performance of the urgent hauling of a wet 56-foot manila line of 8" diameter, weighing over 100 pounds, across a misty steel deck and letting it out through a chock required more than two men, particularly in the light of testimony that the custom was to provide at least 3 men for such tasks (7a-8a). *Salem* v. *U. S. Lines Co.*, 370 U. S. 31, 35-7 (1962).

[5] Certainly, on respondent's motion to dismiss at the close of all the evidence, petitioner's testimony and that of his expert was entitled to be treated as true and the most favorable inferences granted in evaluating whether the evidence was sufficient to present a jury case. *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 327, 329, 330-1 (1960). Captain Darrigan's opinion, although perhaps not necessary to petitioner's *prima facie* case, was clearly admissible and raised an issue for jury determination. *Eastern Transportation Line* v. *Hope*, 95 U. S. 297 (1877); *Carlson* v. *Chisholm-Moore Hoist Corp.*, 281 F.2d 766, 772 (2d Cir. 1960).

The trial evidence did disclose that the only unusual event during the docking was that a sudden order was given to let the heavy manila line out through a chock that was farther forward than the chocks that were usually used (5a, 7a, 19a). The manila line was coiled 56 feet aft of that chock (26a), and it was this order which gave rise to the petitioner's assignment to the task in which he was injured and exposed him to the risk of that injury (5a-10a).

Although petitioner was injured during performance of his work orders aboard ship, the courts below deprived him of the protection of the doctrine of unseaworthiness. Taken as a whole the ship had a full crew and the accident did not involve inherently defective gear. Petitioner's injury, however, was caused by an insufficiency of personnel for the particular task at hand and by adoption of an improper work method, or, as Judge Smith dissenting below alternatively phrased it, through "using equipment in a manner which makes it unsafe" (A11).

The fundamental legal and social question which this case presents is whether the risk and burden of such injury is to be borne by the ship owner or by the seaman alone.[6] Of particular concern is the fact that the Second Circuit, which has adopted a restricted anti-seaman position contrary to this Court's philosophy and doctrine, is the very jurisdiction which handles the greatest bulk of seamen's cases.

To the extent that the question here presented has been squarely answered in petitioner's favor by this Court in

---

[6] The controversy of whether the ship owner or the seaman bears this type of burden and risk has been sharply disturbing the Second Circuit for several years. Compare the instant case, *Nuzzo* v. *Rederei, A.S. Willenco*, 304 F.2d 506, 512-3 (1962, Clark, J. dissenting) and *Pinto* v. *States Marine Corp.*, 296 F.2d 1, 8 (1961, Smith, J. dissenting) with *Reid* v. *Quebec Paper Sales & Trans. Co.*, 340 F.2d 34, 40 (1965, Friendly, J. dissenting); see also, *Puddu* v. *Netherlands S.S. Co.*, 303 F.2d 752 (1962, 4 separate opinions).

Mahnich v. *Southern S.S. Co.*, 321 U. S. 96, 103-4 (1944) and *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423, 427-8 (1959)—as Judge Smith believed (A11-A12)—certiorari should be granted to correct this "conflict with applicable decisions of this Court". *Supreme Court Rules*, Rule 19(1)(b).

To the extent that the question is a novel one "which has not been . . . settled by this Court" [*Supreme Court Rules*, Rule 19(1)(b)], the conflict between the Circuits, the basic recurring nature of the situation presented, and the unusual circumstance of judicial dismissal of a seaman's claim during a trial by jury, fully justify the grant of the present petition.[7]

Respectfully submitted,

THEODORE H. FRIEDMAN,
Attorney for Petitioner,
1501 Broadway,
New York, N. Y. 10036.

THEODORE H. FRIEDMAN,
HENRY ISAACSON,
EVE M. PREMINGER,
Of Counsel.

---

[7] The "continued confusion in the lower courts" and need for this Court's review and "more definite statement" in this area has been specifically noted. *The Doctrine of Unseaworthiness in the Lower Federal Courts*, 76 Harvard Law Rev. 819, 830 (1963); *Admiralty: Inadequate Manpower and the Unseaworthiness Doctrine*, 66 Columbia Law Rev. 1180, 1184 (1966).

BLANK

PAGE

SUPREME COURT OF THE UNITED STATES

No. 233.—October Term, 1966.

James J. Waldron, Petitioner, v. Moore-McCormack Lines, Inc. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 8, 1967.]

Mr. Justice Black delivered the opinion of the Court.

The single legal question presented by this case is whether a vessel is unseaworthy when its officers assign too few crewmen to perform a particular task in a safe and prudent manner. It is to resolve this question, which the lower courts answered in the negative [1] and which has caused a conflict among circuits,[2] that we granted certiorari. 385 U. S. 810.

Petitioner, a member of the crew of respondent's vessel S. S. *Mormacwind*, was engaged with four other seamen in a docking operation at the stern of the vessel as it approached a pier. At the last minute, the third mate, who was directing the docking, was instructed to put out an additional mooring line, a heavy eight-inch rope, which

[1] 356 F. 2d 247.

[2] Compare *American President Lines, Ltd.* v. *Redfern*, 345 F. 2d 629, with *The Magdapur*, 3 F. Supp. 971; *Koleris* v. *S. S. Good Hope*, 241 F. Supp. 967; and the instant case. Other cases from the Third, Fourth, Fifth, and Ninth Circuits also seem to suggest a result different from the one reached in the instant case. See, *e. g.*, *Ferrante* v. *Swedish Am. Lines*, 331 F. 2d 571, cert. dism'd, 379 U. S. 801; *Thompson* v. *Calmar S. S. Corp.*, 331 F. 2d 657, cert. denied, 379 U. S. 913; *Hroncich* v. *American President Lines, Ltd.*, 334 F. 2d 282; *Scott* v. *Isbrandtsen Co.*, 327 F. 2d 113; *Blassingill* v. *Waterman S. S. Co.*, 336 F. 2d 367; *June T., Inc.* v. *King*, 290 F. 2d 204. For a critical discussion of the decision below, see 66 Col. L. Rev. 1180 (1966).

was completely coiled on the deck. The mate then ordered petitioner and another crewman to uncoil this heavy rope and carry it 56 feet to the edge of the ship. While petitioner was uncoiling a portion of the rope to carry it to the edge of the ship, he fell and injured his back. At the trial, as the Court of Appeals recognized, "[t]here was expert evidence to the effect that 3 or 4 men, rather than 2, were required to carry the line in order to constitute 'safe and prudent seamanship.'" 356 F. 2d 247, 248. Petitioner did not contend that the vessel as a whole was insufficiently manned nor that there were too few men at the stern engaged in the overall docking operation. Neither did he contend that the third mate or the seaman assigned to uncoil the rope with him were incompetent, or that the rope was itself defective. His sole contention was that the mate's assignment of two men to do the work of three or four constituted negligence and made the vessel unseaworthy. The District Court allowed the negligence issue to go to the jury, which found for respondent, but granted a directed verdict to respondent on the unseaworthiness issue, holding that the above facts could not, as a matter of law, constitute unseaworthiness. The Court of Appeals, with one judge dissenting, affirmed, holding:

> "If someone is injured solely by reason of an act or omission on the part of any member of a crew found to be possessed of the competence of men of his calling, there can be no recovery unless the act or omission is proved to be negligent." 356 F. 2d, at 251.

It is here unnecessary to trace the history of the judicial development and expansion of the doctrine of unseaworthiness. That task was recently performed in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 543–549, where

the Court, rejecting the notion that a shipowner is liable for temporary unseaworthiness only if he is negligent, concluded: "There is no suggestion in any of the decisions that the duty is less onerous with respect to . . . an unseaworthy condition which may be only temporary. . . . . What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence." 362 U. S., at 549, 550. It is that principle which we conclude the lower courts failed to apply in their decisions in this case.

The basic issue here is whether there is any justification, consistent with the broad remedial purposes of the doctrine of unseaworthiness, for drawing a distinction between the ship's equipment, on the one hand, and its personnel, on the other. As regards equipment, the classic case of unseaworthiness arises when the vessel is either insufficiently or defectively equipped.[3] In *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, however, the Court made it clear that the availability of safe and sufficient gear on board does not prevent the actual use of defective gear from constituting unseaworthiness, for the test of seaworthiness is to be applied "when and where the work is to be done." *Id.*, at 104. And in *Crumady* v. *The J. H. Fisser*, 358 U. S. 423, we further clarified the extent of unseaworthiness liability by holding that, even though the equipment furnished for the particular task is itself safe and sufficient, its misuse by the crew renders the vessel unseaworthy. We emphatically stated the basis of our holding: "Unseaworthiness extends not only to the vessel but to the crew." *Id.*, at 427. For that proposition the Court cited *Boudoin* v. *Lykes Bros. S. S. Co.*, 348 U. S. 336, where we said, "We see no reason to draw

[3] See generally Gilmore & Black, Admiralty § 6–38 *et seq.* (1957).

a line between the ship and gear on the one hand and the ship's personnel on the other." *Id.*, at 339.[4]

We likewise see no reason to draw that line here. That being so, under *Mahnich* it makes no difference that respondent's vessel was fully manned or that there was a sufficient complement of seamen engaged in the overall docking operation, for there were too few men assigned "when and where" the job of uncoiling the rope was to be done.[5] And under *Crumady* it makes no difference that the third mate and two men he assigned to perform the job were themselves competent seamen, or that the rope was itself a sound piece of gear. By assigning too few men to uncoil and carry the heavy rope, the mate caused both the men and the rope to be misused.

This analysis, we believe, is required by a clear recognition of the needs of the seaman for protection from dangerous conditions beyond his control and the role of the unseaworthiness doctrine which, by shifting the risk to the shipowner, provides that protection. If petitioner had been ordered to use a defective pulley in lifting the rope, he would clearly be protected by the doctrine of unseaworthiness. If the pulley itself were sound but petitioner had been ordered to load too much rope on it, he

---

[4] This statement, of course, was made in the context of our holding that unseaworthiness results when a member of the crew is "not equal in disposition to the ordinary men of that calling." 348 U. S., at 340. That is so, we explained, because the shipowner has a duty to provide a crew "competent to meet the contingencies of the voyage." *Ibid.* The Court of Appeals here recognized that "the vessel must be manned by an adequate and proper number of men," 356 F. 2d, at 251 (see, *e. g.*, *De Lima* v. *Trinidad Corp.*, 302 F. 2d 585; *June T., Inc.* v. *King*, 290 F. 2d 204), but then proceeded to draw a distinction between a well-manned ship and a well-manned operation aboard the ship.

[5] Under *Mitchell*, it makes no difference that the unseaworthy condition caused by inadequate manpower "may be only temporary." 362 U. S., at 549. See generally Note, 76 Harv. L. Rev. 819 (1963).

would likewise be protected. If four men had been assigned to uncoil the rope but two of the men lacked the strength of ordinary efficient seamen, petitioner would again be protected. Should this protection be denied merely because the shipowner, instead of supplying petitioner with unsafe gear, insufficient gear, or incompetent manual assistance, assigned him insufficient manual assistance? We think not. When this Court extended the shipowner's liability for unseaworthiness to longshoremen performing seamen's work, *Seas Shipping Co.* v. *Sieriacki,* 328 U. S. 85—either on board or on the pier, *Gutierrez* v. *Waterman S. S. Corp.,* 373 U. S. 206, either with the ship's gear or the stevedore's gear, *Alaska S. S. Co.* v. *Petterson,* 347 U. S. 396, either as employees of an independent stevedore or as employees of a shipowner *pro hac vice, Reed* v. *The Yaka,* 373 U. S. 410—we noted that "the hazards of maritime service, the helplessness of the men to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the 'humanitarian policy' of the doctrine of unseaworthiness," *id.,* at 413, should prevent the shipowner from delegating, shifting, or escaping his duty by using others' men or others' gear to perform the ship's work. By the same token, the shipowner should not be able to escape liability merely because he has used men rather than machines or physical equipment to perform that work.

Petitioner is entitled to present his theory of unseaworthiness to the jury, and the case is reversed and remanded for that purpose.

It is so ordered.

BLANK PAGE

SUPREME COURT OF THE UNITED STATES

No. 233.—October Term, 1966.

James J. Waldron, Petitioner, v. Moore-McCormack Lines, Inc. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 8, 1967.]

Mr. Justice White, with whom Mr. Justice Harlan, Mr. Justice Brennan, and Mr. Justice Stewart join, dissenting.

Under the prevailing cases in this Court, there can be no doubt that a negligent or improvident act of a competent officer, crewman, or longshoreman can result in unseaworthiness if it renders otherwise seaworthy equipment unfit for the purpose for which it is used. *Crumady* v. *The J. H. Fisser*, 358 U. S. 423. Likewise, petitioner argues, an order of a ship's officer assigning too few men to do a particular task creates an unseaworthy condition because the ship is undermanned in this specific respect. He challenges therefore the prevailing rule in the Second Circuit requiring plaintiff in situations such as this to prove not only that the order was improvident but also that the officer issuing it was not equal in competence to ordinary men in the calling. See *Pinto* v. *States Marine Corp. of Delaware*, 296 F. 2d 1; *Ezekiel* v. *Volusia S. S. Co.*, 297 F. 2d 215, and authorities cited therein. The majority agrees with the petitioner, at least where the improvident order requires the performance of tasks whose safe completion calls for the assignment of more men. The majority holds that the case should have gone to the jury on both the negligence and unseaworthiness claims.

In my view, however, this case should be disposed of on other grounds. While it is true that unseaworthiness

is legally independent of negligence, *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, it cannot be denied that in many cases unseaworthiness and negligence overlap. And on the facts of this case I think the claim of negligence was identical with the claim of unseaworthiness. As the majority says, petitioner's sole assertion is that assigning two men instead of three or four to put out the line was "negligence and made the vessel unseaworthy." The testimony supporting the claim was that safe and prudent seamanship would require three or four men to move the line. But the jury ruled against petitioner on his negligence claim, thereby deciding that the mate employed ordinary care in assigning two men to do the task. To me, the jury simply disagreed with petitioner's witness and, based on the testimony of petitioner himself and that of the seaman who helped him, decided that it was not imprudent seamanship to have two men move the line rather than three or four. Had the jury thought otherwise and considered the job to require more than two men, it would have found the issuance of the order to be a negligent act. It is perhaps possible to conceive circumstances in which the assignment of two men to do the job of three would not be negligence, but I find no such special facts in this record. In my view, the adverse verdict on negligence makes unnecessary a retrial on the unseaworthiness claim even if one adopts the majority's resolution of the legal question presented by petitioner.